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No. 80—

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The Surface Mining Act declares that "the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States." The Act accordingly gives the state regulatory authority, acting under a program approved by the Secretary of Interior, the exclusive responsibility to issue coal mining permits; the Act also specifies the information to be included in a coal mining permit application submitted to the state agency regulatory authority. The Secretary has promulgated 33 double-columned pages of uniform, nationwide regulations amplifying the statute and prescribing in massive detail the information that an applicant for a coal mining permit must furnish to the state authority.

The question presented is whether the Act authorizes the Secretary to require a state to adopt his Federal regulations prescribing in detail the information which must be submitted in a permit application in order for the state to obtain approval of its program and to be able to exercise its exclusive statutory responsibility of issuing coal mining permits.

PARTIES BELOW

The parties to this proceeding when it was decided on the merits by the *en banc* court below are those indicated by the caption * and the National Wildlife Fed-

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* All of the outstanding stock of Peabody Coal Company is owned by Peabody Holding Company, Inc., the stock of which is owned by—

Newmont Mining Corporation (27.5%)
The Williams Companies (27.5%)
Bechtel Corporation (15%)
The Boeing Company (15%)
Fluor Corporation (10%)
The Equitable Life Insurance Society of the United States (5%).

eration.** Additional parties in closely related litigation in the courts below, who also have an interest in the outcome of this proceeding, are:

The State of Illinois
The Commonwealth of Virginia
American Mining Congress
National Coal Association
Pennsylvania Coal Mining Association
The Dow Chemical Company
R & F Coal Company

** Joined by Counsel for Appalachian Coalition, Council of the Southern Mountains, Inc., Northern Plains Resource Council, Natural Resources Defense Council, Inc., Illinois South, and Texas Committee on Natural Resources.

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OPINIONS BELOW

The opinion of the District Court denying petitioner's motion for preliminary injunction [App. F, 148a, 176a-187a] [1] is reported at 13 E.R.C. 1586. The opinion of the Court of Appeals affirming that denial [App. E, 144a-147a] is reported at 617 F.2d 807. The opinion of the District Court denying relief on the merits [App. D, 73a, 101a-105a] is reported at 14 E.R.C. 1083. The opinion of the panel of the Court of Appeals reversing that decision [App. C, 48a-72a] is reported at 14 E.R.C. 1813. The opinion of the Court of Appeals *en banc*, affirming the District Court [App. A, 1a-45a], is reported at 15 E.R.C. 1802.

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[1] Citations to "App." refer to a separate appendix which accompanies the instant petition pursuant to Rule 21(k) of this Court.

JURISDICTION

The judgment [App. I, 291a] and opinion of the Court of Appeals *en banc* were entered on April 1, 1981. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

There are set out in the Appendix to this Petition the following provisions:

Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201, *et seq.* [App. G, 188a-205a].

Sections 101
102
201(a)
201(c)
501(b)
505
506(a)
507
508

Surface Coal Mining and Reclamation Regulations—Permanent Regulatory Program, 30 C.F.R. § 700, *et seq.* (1980) [App. H, 206a-290a].

Parts 778
779
780
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784

STATEMENT OF THE CASE

1. *The Industry.* The record pertaining to the rules at issue shows that the Nation has coal reserves in 37 states and over 6000 operating mines. Of these, approxi-

mately 3700 are surface mines, accounting for 57 per cent of the 679 million tons of coal produced annually.[2]

Most of the surface coal mines are small, typically located in the eastern United States. Others, typically in the western states, are very large. The rulemaking record also shows that surface coal production is distributed according to mine size as follows: [3]

Annual Production (tons)	Number of Mines	Per Cent of Total Production
0-100,000	315	21
100,001-500,000	466	22
500,001-1,000,000	51	10
over 1,000,000	72	47
	3739	100

2. *The Act.* The Surface Mining Act, after a prolonged legislative effort,[4] was enacted on August 3, 1977. It generally confers the Federal authority upon the Secretary of the Interior ("the Secretary") and in Title II creates the Office of Surface Mining Reclamation and Enforcement ("OSM") through which the Secretary shall ordinarily act.

The Act contemplates a separate "interim" phase of the regulatory program, with hybrid state-federal administration for the period prior to the permanent program. Coal mining continues under the existing permits issued under the traditional authority of the states, but subject

[2] U.S. Dept. of Interior, Data from Draft Environmental Statement, Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (1978), pp. B-II-2.

[3] U.S. Dept. of Interior, Draft Regulatory Analysis for Permanent Regulatory Program of the Surface Mining Control and Reclamation Act of 1977 (Sept. 1978), p. 11.

[4] It was considered from the 90th through the 95th Congress, including two presidential vetoes. The general course of the legislative history is given in H.R. Rep. No. 1072, 93d Cong., 2d Sess. 121-122 (1974), and H.R. Rep. No. 218, 95th Cong., 1st Sess. 140-141 (1977).

to certain performance standards prescribed and enforced by the Secretary. § 502.

The administration of the permanent program is to commence with the preparation and submission of a regulatory program by each coal-producing state. This is to be approved or disapproved, after public hearing, by the Secretary pursuant to criteria specified in the Act. § 503. These, generally, require a showing of effective administration and consistency with the Surface Mining Act and the Secretary's regulations. If disapproved, the state has opportunity to submit a revision for the Secretary's approval. § 503(c). If the state does not submit a program, or if it is disapproved, then the Secretary shall after notice and public hearing promulgate a "Federal program" for the state, to be effective until the state should have submitted a state program which is approved by the Secretary. § 504.

The Act in many areas speaks of the administering body as the "regulatory authority." This is the appropriate state agency where there is an approved state program, and is the Secretary where a Federal program is in force for that state. § 701(22). We do not here complain of the regulations insofar as they might govern the administration of the Act under a Federal program, or in respect of Federal lands, but address only their application to what was expected to be the usual situation, a state "regulatory authority" acting in respect of private lands pursuant to state law and with the Secretary's approval of the state program.

Coal mining can be conducted only under a permit, not to exceed five years in term, issued by the regulatory authority. § 506. The mine operator must submit with his permit application a great deal of financial, operating and environmental data, § 507, as well as correspondingly detailed information as to the reclamation plan. § 508. The Act grants the Secretary no authority to

review or revise the action of a regulatory agency in granting or denying a permit.

Section 515 enacts a very elaborate series of "performance standards" designed fully to protect the environment in all aspects of surface coal mining and reclamation. These are also to be applied by the Secretary's regulations to the surface effects of underground coal mining, bearing in mind "the distinct difference between surface coal mining and underground coal mining." § 516.

A system of inspections, penalties and enforcement orders is provided; in general these are the responsibility of the state regulatory authority but subject to monitoring and supervision by the Secretary. §§ 517, 518, 521. Any citizen adversely affected may file complaint to compel compliance with the Act. § 520.

3. *The Regulations.* The Secretary issued the permanent regulations on March 13, 1979. 44 Fed. Reg. 15312 (1979). They make up a 431-page portion of Title 30 of the *Code of Federal Regulations.* Parts 778-780 and 782-784 of the permanent regulations prescribe in prodigious detail the information required to be submitted with an application for a mining permit. [App. H, 206a-290a.] These six parts occupy 18 triple-column pages of the *Federal Register*, 44 Fed. Reg. 15353-15370 (1979), and 33 pages of the double-columned 30 C.F.R. (Part II at pages 457-489). Our count indicates that there are 243 textual paragraphs demanding information in respect of surface mining operations and 257 in respect of surface effects of underground mining.

4. *Judicial Review.* Section 526(a)(1) of the Act provides that national rulemaking by the Secretary shall be subject to review in the United States District Court for the District of Columbia within 60 days of his action. Six industry groups or companies and an environmental group challenged about 100 of the separate provisions of the permanent regulations. Something over half of

the issues raised by the industry and the states resulted, by concessions of the Secretary *pendente lite* or by decision of the District Court, in suspension or remand of the regulations. 45 Fed. Reg. 45605-45607 (1980) (listing 62 regulations suspended in light of litigation pertaining to permanent regulations). Twenty-nine issues were appealed to the court below.[5] Briefing would have been completed in March had the Secretary not requested extensions of time for the final brief.

The issue raised here has at many stages been presented and decided separately from the general review proceeding, owing largely to the exigencies of time. Thus it was first presented to the District Court on motion for preliminary injunction, which it denied [App. F, 148a, 176a-187a]; the Court of Appeals affirmed [App. E, 144a-147a]. District Judge Flannery ruled against us in the "First Round" decision on the merits [App. D, 73a, 101a-105a] but by order under Rule 54(b), F.R.Civ.P., allowed separate appeal of this issue. It was given expedited attention by the panel already familiar with the issue on preliminary injunction. The panel decision of July 10, 1981, reversed Judge Flannery [App. C, 48a-72a]. The Secretary's petition for *en banc* rehearing was granted, and the panel decision vacated, without opportunity for reply by petitioner. [App. B, 46a-47a; *cf.* Federal Rule of Appellate Procedure 40(a)]. The *en banc* Court affirmed the District Court by a vote of 7-4, after briefs and arguments for both parties. [App. A, 1a-45a.]

5. *The En Banc Decision Below.* Petitioner premised its challenge to the Secretary's regulations pertaining to permitting information on the grounds, *inter alia*, that (i) the Surface Mining Act in terms affords the states the "primary governmental responsibility for developing, au-

[5] Appeals were taken by industry as to 9 issues, by the states as to 11, by the Secretary as to 8 and by the environmental group as to 7 [non-additive because of double appeals on same issues].

thorizing, issuing and enforcing regulations for surface mining and reclamation operations . . . ." (§ 101(f)); (ii) the Act affords the state regulatory authorities exclusive jurisdiction over the issuance of coal mining permits without review or revision by the Secretary and with judicial review in state courts; and (iii) §§ 507 and 508, which specify the permitting information to be submitted with regard to a coal mining permit, repeatedly refer to the "regulatory authority"—*i.e.*, the states when acting under approved state programs—as the body responsible for overseeing the collection of permit information and do not once refer to the Secretary.

Judge Mikva, writing for the majority below, acknowledged that "the Act contemplates a continuing partnership between the states and the federal government, with the Secretary providing oversight, advice, and back-up authority, and the states bearing the major responsibility for the implementation of the Act." [App. A, 2a.] He further acknowledged that "the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place." [App. A, 8a.] He also agreed that a general rulemaking grant " 'does not provide the [agency] with *carte blanche* authority to promulgate any rules, on any matter that the [agency] wishes.' " [App. A, 18a (quoting *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 873 (D.C. Cir. 1979))]. But, he nevertheless affirmed the District Court on the grounds (a) that the Secretary had interpreted two general rulemaking provisions within the Surface Mining Act—§§ 201(c)(2) and 501(b)—as affording the Federal government the right to dictate permitting information procedures to the states and (b) that the Secretary's interpretation had to be afforded deference by the Court of Appeals. [App. A, 16a-18a.] The primary authority of the state, he said,

came into play only after the state program, conforming to the Secretary's detailed requirements, had been approved. [App. A, 24a-28a.]

Judge Tamm, writing for the minority, found nothing within the Act's general rulemaking provisions to grant the Secretary authority to write regulations in this area, [App. A, 33a-35a], and went on to observe "that Congress intended to vest in the states primary regulatory and decisionmaking authority and to place the Secretary in an oversight role to ensure that the states provide some minimal level of regulation and control." [App. A, 37a.] He further found that "the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to determining whether the states have satisfied the minimum." [App. A, 37a.] Based on these findings, he concluded that "the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out." [App. A, 37a.] He stated further that the majority's reasoning "would turn Congress's scheme on its head [by] allow[ing] supervisory authority to consume state discretion and to reduce state power to a purely ministerial implementation of a [F]ederally devised program." [App. A, 42a.]

Judge MacKinnon, in a separate concurring dissent, concluded that allowing "the Secretary's overly comprehensive regulations to preempt the authority of the states to act in the first instances, would as a practical matter, operate to stifle the activity of all the states in their handling of what Congress has indicated to be largely local state problems. Congress did not express an intent to so limit the authority of the states." [App. A, 44a.] He found "the Secretary's regulations [to] smother all state initiative" in that they "overly expand[] an *oversight* role into a role that permits the Secretary to *formulate* organizational and *operational* rules for the states. This is

a great deal more than 'oversight.'" [App. A, 44a (emphasis in original).]

6. *State Programs.* There has been a history of confusion and delay in the submission and approval of state programs[6] but as of January 1981, the final statutory date, some 16 states had submitted programs to which the Secretary had given either final or conditional approval.[7]

So far as the existing formal requirements go, each of the thousands of mines in these 16 states have been required to submit by March 1981 permit applications in conformity with state programs which have, perforce, copied the massive requirements of the Secretary's regulations. The issue is not, however, moot as to them, since, perfection being impossible, there will inevitably be many deficiencies in their submissions the treatment of which will turn upon the final decision here. The issues, in any event, remain live as to permit applications to be filed for

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[6] The Secretary was required to issue the permanent regulations by August 3, 1978. § 501(b). They were in fact issued on March 13, 1979. [44 Fed. Reg. 15312.] The delay in promulgating the final regulations in the end pushed the time for final action on state programs from April 1980 to January 1981. For example, the state programs were to be submitted on August 3, 1979, §§ 503(a), 504(a), but, because of the tardy regulations, the District Court below enjoined enforcement of the submission date before March 3, 1980. [App. F, 152a-161a.] After a number of state programs had been submitted, that court, by decision or by recognition of the Secretary's concessions, held 62 provisions of the regulations invalid. See, *e.g.*, 45 Fed. Reg. 45605-45607 (1980). Because the ongoing litigation over the permanent regulations led to great uncertainty as to the scope of state programs, state court injunctions have been entered against the submission of programs by 8 states. See, *e.g.*, Judgment, *Meadowlark Farms, Inc.* v. *Indiana Dep't of Nat. Resources*, No. C80-1952 (Marion Cty. Cir. Ct., July 29, 1980); see also § 503(d).

[7] Listing supplied petitioner by the Assistant Solicitor for Government Relations, Division of Surface Mining, Department of Interior, on March 24, 1981.

the opening of new mines in these states. Moreover, the issue remains wholly alive for the thousands of mines in the other 18 coal producing states which have not as yet submitted permanent programs.[8]

REASONS FOR GRANTING THE WRIT

A. *The Issue Is Of First Importance*

1. *Economic and Administrative Dislocations.* It is hardly necessary to document the nation's dependence upon coal as an energy source, or to prove the inflationary impact of a disproportionate increase in the price of coal. In order to continue in operation, each of the Nation's 6000 mines will need a permit. The record before the District Court below demonstrated that petitioner's compliance with the regulations in question alone would cost (in 1979 dollars) about $10 million, or an average of over $200,000 a mine; the applications for each mine may be expected to run about 1500 pages with 75 appendices.[9] The resulting application would be approximately 15 inches thick.[10] If petitioner's expectations were typical, the Kentucky Department of Natural Resources, for example, would have to review during the initial stages of the permanent program about 3.5 million pages which would stack over one-half mile high.[11] These eco-

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[8] Georgia, Washington and Alaska have elected not to submit a state program, and to accept complete federal regulation. *See* Gov't Br., *Andrus* v. *Virginia Surface Mining and Reclamation Ass'n*, Nos. 79-1538, *et al.* (November 1980) at p. 6, n.9.

[9] Annex B (Affidavit of Floyd E. Matthews) and Annex C (Affidavit of James R. Jones) to Certain Industry Plaintiffs' Motion for Preliminary Injunction, *In re Permanent Surface Mining Regulation Litigation*, C.A. No. 79-1144 (D.D.C., June 25, 1979).

[10] *Id.*

[11] To be sure, the problem has been eased somewhat by relief afforded the operators by rulings in a handful of the permitting information regulations in the District Court below. [App. A, 6a, n.4; App. F, 186a-187a.] Most of these limited rulings, however, have been appealed by the Government to the Court of Appeals.

nomic and administrative problems would be eased in every case, and eliminated in some, if the state regulatory authority were authorized to prescribe the information requirements appropriate to the terrain, hydrology and climate of that state, instead of administering a Federally dictated information-gathering program which requires from every mine in the country the aggregate of *all* the particular bits of information which might reasonably be required in respect of one individual mine or another.[12]

2. *The Federal Structure.* As this Court knows from its recent consideration of the Constitutional issues pertaining to the Act, this statute is a land-use provision, and as such pushes more deeply into an area of traditional state authority than any other Act of Congress known to us.[13] The majority below went to great lengths

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[12] The majority below chastised our reference to the economic and administrative dislocations caused by the Secretary's massive requirements by contending that the permitting sections within the Act "are also massive" and that petitioner nowhere "estimates the expense or quantity of paper that would be consumed if the Secretary had promulgated the statutory provisions verbatim as his regulations." [App. A, 6a, n.5.] Suffice it to say, that the Act's 5-page detailed recitation of the permitting information to be required by the regulatory authority has been swelled by the Secretary to 33 double-columned pages in the *Code of Federal Regulations*. Compare App. G, 196a-205a with App. H, 206a-290a. This suggests, though hardly precisely, that 28/33 of our complaint would be assuaged.

[13] See *Indiana* v. *Andrus*, 501 F.Supp. 452 (S.D. Ind. 1980), *ordered stayed pending disposition of appeal*, 14 E.R.C. 1785 (U.S. Sup. Ct., July 2, 1980) and *appeal pending*, *Andrus* v. *Indiana*, No. 80-231 (U.S. Sup. Ct.); *Virginia Surface Mining and Reclamation Ass'n, Inc.* v. *Andrus*, 483 F.Supp. 425 (W.D. Va. 1980), *order stayed pending disposition of appeal*, 14 E.R.C. 1149 (U.S. Sup. Ct., February 25, 1980), and *appeal pending*, *Andrus* v. *Virginia Surface Mining and Reclamation Ass'n*, Nos. 79-1538 *et al.* (U.S. Sup. Ct.).

to find that the Act and its history suggest a carefully balanced concern for national environmental standards, for primary administrative responsibility in the state agencies, and for Federal oversight powers to ensure that the state agencies were doing their job. [App. A, 11a-13a.] However, the majority opinion [App. A. 14a-23a] allows the Secretary, by virtue of the Act's general rulemaking provisions alone, to draw the dividing line between his own powers and that of the states wherever he will. Since the state can administer a program only after its approval by the Secretary, this to the Court below means that the Federal agency can prescribe without limitation the requirements for approval of a state program, even if, as with the permit information requirements, it converts the state "primacy" into the ministerial function of copying off and then applying federal regulations. A rather vivid example is the Secretary's rule that land reclaimed for woodland shall have 450 trees or shrubs per acre [30 C.F.R. § 816.117(b)(1) (1980), which has no variance power]; the state agency can copy that requirement and then count the trees. As Judge Tamm concluded in his dissent, the majority has "reduce[d] state power to a purely ministerial implementation of a [F]ederally devised program." [App. A, 42a.]

Judge Mikva sought to assuage the fears of petitioner and the minority that there are, under the majority's reading of the Act, no bounds to the Secretary's powers by contending that the rulemaking provisions within the Act do "'not provide the Administrator with *carte blanche* authority to promulgate any rules, or any matter relating to the . . . Act.'" [App. A, 18a *(quoting Citizens to Save Spencer County* v. *EPA, supra)*]. But we cited this very case below to the Court to show that, even in the case of permitting information, general rulemaking powers standing alone do not give the Secretary authority

to invade a prerogative assigned by the Act to the states. If the Secretary can preempt the state in its permitting information responsibility, we fail to see the neutral principle of law which would bar the Secretary from invading all other state prerogatives. Indeed, as the litigation below demonstrates, the Secretary has, in fact, by virtue of his 431 pages of regulations, left almost nothing to the discretion of the states for purposes of this Act.

3. *The Judgment of "the Secretary."* Judge Mikva relied almost exclusively on the Secretary's construction of the Act's general rulemaking powers as a basis for validating the regulations. [App. A, 14a-23a.] While this canon of statutory construction has merit in instances where the Secretary is defining his *own* statutory powers, it is, we believe, unprecedented to afford the Secretary deference to expand his own powers at the cost of the states when, as the majority concedes, the Act makes "the state . . . the sole issuer of permits." [App. A, 18a.]

This then is not a situation where a court is deferring to an agency on grounds of the latter's technical expertise, but, instead, the Court gives dispositive deference to the Secretary on a sensitive intergovernmental issue of policy, which, as this Court can surely take notice, went to the very heart of the political debate in the last National election. In short, the majority has gone some distance toward accepting and the freezing into the statute a policy judgment made and promulgated by a Secretary who was no longer in office when the majority's decision was reached. That judgment is now the interpretation of the Act, and therefore ascribed to the same Congress which in terms provided that "the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to this Act should rest

with the States." § 101(f). The majority's result, at best, seems to be highly artificial.

B. *There Can Be No Conflicting View*

The Secretary's "national" regulations are subject to review *only* in the District of Columbia. § 526(a)(1). This issue can, therefore, arise in no other circuit.

The eleven active judges of the United States Court of Appeals for the District of Columbia have divided sharply. This of itself demonstrates that there is no ineluctable logic, nor yet any unmistakable accumulation of indicia, to compel a result either way. None can doubt that another court of appeals might have produced a majority going the other way. We suggest that an issue of the importance and the delicacy of this one ought not to be decided upon the essentially fortuitious grouping of judges in a single intermediate court.

C. *The Decision Below Is Wrong*

We do not conceive that this petition is the place to argue the merits of this protracted controversy. It is enough, for an issue of the importance and delicacy of this one, that the court below was not incontestably right. The very fact of the dissent, to say nothing of the force of its reasoning, shows that the issue is open to very real doubt. We nevertheless, out of a caution appropriate to the occasion, make a very summary showing that the decision of the majority was wrong.[14]

1. *The Text of the Act.* We have always thought that, in determining the agency to which the Congress has as-

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[14] We have also severe complaint that the majority repeatedly misstates, sometimes slightly and sometimes significantly, the position of the petitioner. See, *e.g.*, App. A, 5a, 6a, 11a, 14a, 17a, 18a, 19a, 21a, 22a, 25a. We do not develop our complaint because, however distasteful to counsel, it is hardly ground for *certiorari*.

signed the permit information powers, it would be useful to look to the text of the Act. We implored the court below to make a comparative reading of Title V of the Act. Had it done so it would have found that §§ 506-514 and 519, dealing with permitting and bonding, including the information requirements of §§ 507 and 508, make repeated reference to "the regulatory authority," some 101 instances in all. There is *no* reference to the Secretary. By way of emphasis, § 508(a)(14) calls for such additional permit information "as the regulatory authority shall prescribe by regulations." In contrast, the *Federal* functions covering the interim program [§§ 501-502], the approval of state programs [§ 503], the promulgation of a Federal program for a state without an approved program [§ 504] and federal lands [§ 523] contain repeated references to the responsibilities of the Secretary, 45 in all, and virtually none, 3 in all, to the "regulatory authority." We do not know how an argument could be framed to explain away this clear, specific and discriminating distribution of authority by the very text of the Act. We speculate that the majority, too, saw no way to deal with this textual pattern. In any case, it found no room in its 28-page opinion even to mention the statutory text.[15]

2. *Deference to the Agency.* We have already noted above the inappropriateness of resolving the issue presented by deferring to the outgoing Secretary's construction of the Act's general rulemaking provisions. We

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[15] We should also note that the Act in terms provides that "[n]o state law or regulation . . . shall be superseded by any provision of this Act or any regulation issued pursuant thereto, *except insofar as such state law or regulation is inconsistent with the provisions of the Act.*" § 505(a). The majority's ruling has the effect of invalidating state laws and regulations which are consistent with the Act, but *inconsistent with the Secretary's regulations.* For this reason, as well, the majority's opinion squarely conflicts with the statute in question.

would add that the Secretary's reliance upon the standard cases showing that deference is due the agency's interpretation of its own statute [App. A, 16a-18a] founders upon the Court's failure to recognize that the question presented is *which* agency, Federal or state, has been charged with the administration of this part of the Act? Until that is known, one cannot tell to which agency deference is owed.

The weakness in the majority's reasoning on this issue is most dramatically evidenced by its reliance upon *E.I. du Pont de Nemours* v. *Train*, 430 U.S. 112 (1977), where this Court attached incidental significance to a general grant of rulemaking authority in the Clean Water Act to sustain regulations prescribing specific effluent limitations rather than awaiting case-by-case decision on 42,000 applications. That case, however, presented no issue of state versus Federal responsibility. While, under the Water Act, EPA may, if it so chooses, delegate permit authority to a state agency, the permitting decisions remain, as the Court expressly stated [430 U.S. at 137], a federal responsibility: *i.e.*, permitting applications are filed also with EPA which can revise or reverse the state agency. Even the majority below clearly recognized this distinction when it said:

> "The independence of a state administering an approved state program under the Surface Mining Act may be contrasted with the *continuing* role of the [EPA] after a state has assumed responsibility for pollution discharge permits under the [Water Act]. The EPA Administrator retains veto power over individual permit decisions under that statute, ..." [App. A, 9a, n.7 (emphasis added).]

3. *The Rulemaking Provisions.* The general rulemaking provisions within the Act, in and of themselves, do not provide for the sweeping authority the former Secretary gathered to himself here.

a. § *201(c)*. This provision, found in the housekeeping section establishing OSM, gives the Secretary author-

ity to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." The majority's reliance upon § 201(c) as a source of Federal power to dictate to states the way in which they should carry out their statutorily assigned responsibilities amounts to question-begging since the exact issue here is whether the regulation *is* consistent with "the purposes and provisions of the Act" [App. A, 18a-19a]. It is especially strange that so much importance should be attached to this provision since we have not found a single reference to § 201(c) in the legislative history during the seven years that Congress considered this statute.

b. *§ 501(b).* This section, reduced to the essentials of the current debate, authorizes regulations—

> "establishing procedures and requirements for preparation, submission and approval of state programs; and development and implementation of Federal programs . . . ."

The majority below "recognize[s] that the language of section 501(b) is not entirely lucid," but finds that this provision, in light of "the Secretary's reading," confirms in the Federal government a plenary rulemaking authority over all matters to be found in a state program; this is on the theory that the Secretary can by rulemaking advise what kind of state programs he will approve. [App. A, 20a-23a.] This argument, giving the Secretary unlimited power to impose any regulations he chooses, confuses the power to approve with the power to prescribe. Indeed, it cannot be reconciled with § 501(b) itself. Surely, the power to establish "procedures and requirements for preparation, submission and approval of state programs" is narrower than the power of the "development and implementation" given in respect to Federal programs. The majority ignores this contrast in language, but Judge MacKinnon in his dissent correctly

states that "the majority has overly expanded an *oversight* role into a role that permits the Secretary to *formulate* organizational and *operational* rules for the states. This is a great deal more than 'oversight.'" [App. A, 44a (emphasis in original).]

4. *Congressional Intent.* The majority attempts to buttress its resolution of the issue by pointing to passages in the legislative history which show Congressional dissatisfaction with state mining regulation practices in existence at the time the Act was passed. [App. A, 11a-13a.] But, a critical examination of both the majority's analysis and the legislative history makes clear that Congress intended to remedy that problem by legislating ten pages of environmental performance standards which must be met within each state, 91 Stat. 486-495, and five pages of permitting information which state regulatory authorities must gather from operators. 91 Stat. 474-479. In short, Congress in drafting this statute with great precision left to chance no matter of consequence when it in terms placed the "primary governmental responsibility" in the hands of the states. § 101(f).

We do not dispute that state responsibilities were to be monitored, as the majority's citations to the legislative history make clear, by " 'a *limited Federal oversight role* as well as increased opportunity for citizens to participate in the enforcement program . . . .' [App. A, 12a (quoting from H.R. Rep. No. 218, 95th Cong., 1st Sess. 129 (1977)]. But that "limited" role was not to be in the form of 431 pages of double-columned Federal "regulations [which] practically smother all state initiative." [App. A, 44a.] [16]

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[16] Indeed, Judge Tamm, in his dissent, correctly outlined the general contours of the Federal government's role as follows:

". . . . [I]f a state fails to abide by its responsibilities under the Act, the Secretary may enforce the Act against particular

The majority's reading of the Act also defies its own acknowledgment that "the Act contemplates a continuing partnership between the states and the federal government, with the Secretary providing oversight, advice, and back-up authority, and the states bearing the major responsibility for implementation of the Act." [App. A, 2a.] The regulations at issue and the majority opinion have converted that "continuing partnership" into the relationship that a vassal has with his king.

5. *Common Sense.* It is agreed by all that the state regulatory authority has the exclusive power to grant or deny a mining permit, without review or revision by the Secretary, and with judicial review in the state courts. The majority quoted what it called our "most significant argument":

> "The Congress cannot reasonably be supposed to have created an administrative structure so bizarre that the agency which has the exclusive power to decide the issues is powerless to determine the information which it needs to reach that decision." [App. A, 24a.]

The majority thought the conclusive answer to this point was that the Secretary had oversight responsibility over the state programs and could specify the data necessary to exercise that authority [App. A, 24a]. This is sleight of hand by fiat. One needs only glance at the regulations to see that the information is required for permit grant or denial—a responsibility of the states—and not related at all to the wholly separate oversight machinery assigned to the Secretary.

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mines [§ 521(b)], and, after following certain procedures, assume full authority for issuing and enforcing permits within that state [*id.*]. Until such inadequate enforcement appears, however, the Secretary's actual power to compel compliance with his wishes is limited to approving state programs based on the criteria set forth in the Act [§ 503] and to monitoring success through the federal inspection systems." [App. A, 42a.]

6. *In Sum.* It seems to us clear that the majority reasoning was wrong. It is clear, moreover, that we have here a basic issue of the distribution between the Federal and the state governments of responsibility for a very broad program, which in its nature should finally be determined by the highest court rather than by a 7-4 majority of a single intermediate court.

CONCLUSION

This petition for writ of certiorari should for the reasons given above be granted.

Respectfully submitted,

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No. 80-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner,
v.
JAMES A. WATT, SECRETARY OF THE INTERIOR

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1308

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION
PEABODY COAL COMPANY,
Appellant

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-1144)

Argued *en banc* October 23, 1980

Decided April 1, 1981

Before: MCGOWAN, *Chief Judge*, and WRIGHT, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Dissenting opinion, in which *Circuit Judges* MACKINNON, ROBB, and WILKEY join, filed by *Circuit Judge* TAMM.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

MIKVA, *Circuit Judge*: This case presents a narrow question concerning the relative authority of the Secre-

tary of the Interior and the states in the administration of the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act, or Act), 30 U.S.C. §§ 1201-1328 (Supp. I 1977). The United States District Court for the District of Columbia held that the Act gives the Secretary rulemaking power to prescribe minimum information requirements for permit applications submitted to state regulatory agencies. We conclude that the Act does give the Secretary this authority, and accordingly affirm the judgment of the district court.

I. The Issue Presented

The Surface Mining Act embodies Congress' recognition that "the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public." Act § 101 (d).[1] After an initial period of direct regulation by the Secretary, the Act contemplates a continuing partnership between the states and the federal government, with the Secretary providing oversight, advice, and back-up authority, and the states bearing the major responsibility for implementation of the Act. The crucial step in accomplishing this transition is a state's submission of its proposed regulatory program to the Secretary for his approval. The Secretary may only approve the state

---

[1] Sections of the Act, 30 U.S.C. §§ 1201-1328 (Supp. I 1977), are cited in this opinion by their designation in the Statutes at Large. The parallel United States Code citations for title V of the Act, §§ 501-529, are 30 U.S.C. §§ 1251-1279. Other sections to which frequent reference is made are:

Section 101—30 U.S.C. § 1201
Section 102—30 U.S.C. § 1202
Section 201—30 U.S.C. § 1211
Section 405—30 U.S.C. § 1235.

program if he finds it capable of carrying out the exacting provisions of the Act, and consistent with his own regulations. Act § 503(a).

Whether regulation is under federal authority or an approved state program, persons wishing to engage in surface mining must obtain a permit from the regulatory authority. Act § 506(a). Permits may not be granted unless the applicant successfully carries the burden of establishing full compliance with the applicable program, and the applicant must submit detailed information from which the regulatory authority and interested citizens may judge compliance. Act §§ 510(b), 507(b). Section 507(b) lists a large number of items which, "among other things," a permit application must contain.

The Secretary's regulations for the permanent regulatory program, issued in March 1979, includes rules concerning the content of acceptable state program submissions. *See* 44 Fed. Reg. 14,902, 15,312 (1979) (codified at 30 C.F.R. pts. 700-890 (1979)). These regulations specify minimum information that a state must require in a permit application, information which extends beyond the explicit information requirements detailed in the Act itself. *See* 30 C.F.R. pts. 778-784 (1979).

Various interested persons filed actions in the United States District Court for the District of Columbia, challenging the permanent regulations.[2] Appellant attacked the Secretary's information requirements in sweeping terms, denying that the Secretary possessed any power to promulgate regulations on that subject. Appellant also criticized numerous individual regulations as, for various

---

[2] The Act specifically provides that "[a]ny action by the Secretary promulgating national rules or regulations including standards pursuant to sections 501, 515, 516, and 523 shall be subject to judicial review in the United States District Court for the District of Columbia Circuit [*sic*]." Act § 526(a)(1).

reasons, beyond the scope of the Secretary's authority. In February 1980, the district court reached a decision on some of the many issues presented in the cases consolidated before it. The court concluded that "the structure of the Act, the general grants of rulemaking authority, and section 501(b) support the Secretary's power" to issue regulations requiring the states to demand more information than the statute itself requires. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, mem. op. at 31 (D.D.C. Feb. 26, 1980). The district court entered a final judgment in accordance with rule 54(b) of the Federal Rules of Civil Procedure on that portion of its decision dealing with the Secretary's rulemaking power so that Peabody Coal Company could appeal that determination without delay. On July 10, 1980, a panel of this court reversed the judgment of the district court. Upon the Secretary's petition, we granted rehearing en banc and vacated the panel decision.

An illustration or two will suffice to demonstrate the absolute character of appellant's claim. Section 522(e)(5) of the Act forbids new surface coal mining operations "within three hundred feet from any occupied dwelling, unless waived by the owner thereof." The explicit information requirements of the Act, however, do not mandate that a permit application include any information from which it can be ascertained whether such owners have consented to the proposed operations. The Secretary's regulations require the operator to submit evidence of such consent with the permit application. 30 C.F.R. § 778.16(c) (1979). Congress also directed the Secretary to promulgate "regulations directed toward the surface effects of underground coal mining operations," Act § 516(a), and to make such modifications in the requirements of the Act "as are necessary to accommodate the distinct difference between surface and underground coal mining," Act § 516(d). Understand-

ably, the explicit information provisions of the Act do not anticipate all of the Secretary's modifications. *See, e.g.*, 30 C.F.R. § 784.14(d) (1979). Yet appellant denies that the Secretary has the power to issue any regulations requiring permit applications to include information that may be necessary to ensure compliance with section 522 (e) (5) or the Secretary's modifications under section 516, unless that information is already demanded explicitly by the Act. Appellant insists that only the states have the power to increase the information requirements of the Act.

Our inquiry is narrow. We are called upon to determine only whether the Secretary has rulemaking authority to require that permit applicants submit *any* items of information beyond those enumerated in the Act.[3] The partial summary judgment we review does not extend to the question whether the regulations actually promulgated by the Secretary are permissible exercises of that authority. Challenges to individual regulations are being separately adjudicated in the court below,

---

[3] Appellant argues that the Act forbids the Secretary to require information not included in sections 507 and 508 of the Act. Careful examination of the Act reveals that these sections do not exhaust the information that the Act directs permit applicants to submit. *See* Act §§ 510(b)(6) (requiring submission of written consent of surface owner), 510(c) (applicant must "file with his permit application" a list of violations of certain related laws), 506(b) (term of permit may not exceed five years unless applicant demonstrates longer term necessary to obtain financing), 510(b)(4) (permit for operations in area under study for designation as unsuitable for surface mining only to be granted if applicant demonstrates substantial legal and financial commitments made before January 1, 1977); *see* 30 C.F.R. §§ 778.15(b), 778.14(c), 778.17(b), 778.16(b) (1979), respectively. We believe it only fair to recharacterize appellant's argument as one challenging permit information requirements beyond those of the Act, generally, so as to relieve appellant of an inadvertently underinclusive argument.

with varying results.[4] Appellant insists both in briefs and in oral argument to this court that the Secretary has no power to prescribe information requirements for permit applications.[5]

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[4] For example, on the same day that he upheld the Secretary's power to issue regulations on the subject of permit information, the district judge upheld specific requirements contained in 30 C.F.R. §§ 778.16(a) (identification of areas designated unsuitable for mining), 779.14(b) (analyses of strata above and immediately below the coal seam), 784.20 (subsidence control plan) (1979), and remanded for revision requirements contained in 30 C.F.R. §§ 779.20 & 780.16 (fish and wildlife information), 779.21 & 783.21 (soil survey information for non-prime farmland) (1979). He also rejected the Secretary's definition of "mine plan area" in 30 C.F.R. § 701.5 (1979), and suspended the application of all regulations in 30 C.F.R. pts. 779, 780, 783 & 784 (1979) to the extent they depend on that definition. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144 (D.D.C. Feb. 26, 1980).

[5] *See, e.g.*, Appellant's Supplemental Brief on Rehearing En Banc at 13 ("We urge instead that the Secretary has no power to issue *any* regulation implementing the provisions of §§ 507 and 508.") (emphasis in original). Appellant explicitly acknowledges that it does not contest in this court the substantive validity of the individual regulations. "Peabody sought relief by preliminary injunction not only because of lack of authority in the Secretary but because of this massive and inflexible detail. It did not appeal the denial of relief on the latter ground." *Id.* at 11. Having thus properly identified the scope of the appeal, appellant nonetheless lapses periodically into attacks on the arrogance of the Secretary and the massive detail of his regulations, offering arithmetical demonstrations of the burdens the regulations impose. Appellant nowhere recognizes that the explicit requirements of sections 507 and 508 themselves are also massive, or estimates the expense or the quantity of paper that would be consumed if the Secretary had promulgated the statutory provisions verbatim as his regulations. At any rate, these allegations merely form part of the background for this case, and are not arguments we must address. The only question before us is the *existence* of the Secretary's rulemaking authority, not whether he has abused it.

We have, therefore, no occasion to assess the Secretary's justifications for individual regulations. We neither approve nor disapprove any regulation, and our decision today in no way forecloses subsequent timely challenges to those regulations, either here or in the court below.

II. The Roles of the States and the Secretary in Administering the Surface Mining Act

Congress chose a special kind of regulatory structure for the Surface Mining Act, in which the federal government shares administrative responsibility with the states. Rather than reposing all decisionmaking power with the Secretary of the Interior, Congress afforded the states an opportunity to propose regulatory programs of their own, conforming to the requirements of the Act and to regulations promulgated by the Secretary.[6] Under

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[6] Section 503(a) of the Act provides, in part:

> Each State in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, . . . shall submit to the Secretary, by the end of the eighteenth-month period beginning on the date of enactment of this Act, a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through—
>
> (1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;
>
> . . . .
>
> (4) a State law which provides for the effective implementatio[n], maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulatio[n] of surface coal mining and reclamation operations for coal on lands within the State;
>
> . . . .
>
> (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

a state program, the state makes decisions applying the national requirements of the Act to the particular local conditions of the state. The Secretary is initially to decide whether the proposed state program is capable of carrying out the provisions of the Act, but is not directly involved in local decisionmaking after the program has been approved.

The essence of appellants' arguments against the Secretary's claimed rulemaking power is that it does violence to the special allocation of decisionmaking power effected by the statute's structure. Because the state has the "primary governmental responsibility" under an approved state program, Act § 101(f), appellant urges that the Secretary has no power to decide what information the state should have before it makes its decisions.

The Secretary responds that this argument exaggerates the independence of the state's role in administering an approved program and slights the Secretary's responsibilities in approving and overseeing such a program. Appellant, according to the Secretary, would place an unjustified limitation on his approval role by denying his right to ask the states to seek more information in the permit application than explicitly required by the statute.

A. *The State's Role in Administering an Approved State Program*

In an approved and properly enforced state program, the state has the primary responsibility for achieving the purposes of the Act. First, the state is the sole issuer of permits. In performing this centrally important duty, the state regulatory authority decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place. *See* Act §§ 506, 510. It decides whether a permittee's techniques for avoiding environ-

mental degradation are sufficient and whether the proposed reclamation plan is acceptable. Act § 510(b). The state sets the amount of the bond to be posted by the operator, and inspects the mine to determine compliance. Act §§ 509, 517. When permit conditions are violated, the state is charged with imposing appropriate penalties. Act § 518(i).

Finally, it is with an approved state law and with state regulations consistent with the Secretary's that surface mine operators must comply. *See* Act § 503(a), 518(i). Administrative and judicial appeals of permit decisions are matters of state jurisdiction in which the Secretary plays no role. Act § 514.[7]

As long as the state properly enforces its approved program, it is the exclusive "on the scene" regulatory authority.[8] It is, essentially, the entity that applies the general standards of the Act to the particular geographical and geological circumstances of the state. Congress cited the flexibility achieved in this allocation of regulatory functions as its reasons for leaving "primary governmental responsibility" with the states. Act § 101(f).

B. *The Secretary's Role in Approving and Overseeing a State Program*

Once the state has assumed all these functions, the Secretary's role is primarily one of oversight. The stat-

[7] The independence of a state administering an approved state program under the Surface Mining Act may be contrasted with the continuing role of the Environmental Protection Agency after a state has assumed responsibility for pollution discharge permits under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. II 1978). The EPA Administrator retains veto power over individual permit decisions under that statute, *see id.* § 1342(d).

[8] Except for federal inspectors, whose intermittent presence on the scene is required by the Act even when an approved state program is in control. Act § 517.

ute requires occasional federal on-site inspections "to evaluate the administration of approved State programs." Act § 517(a). Interested persons may also report suspected violations of the Act or of state-imposed permit conditions to the Secretary, and if he has reason to believe the allegations he must notify the state regulatory authority. Act § 521(a). If the state fails to take appropriate action, the Secretary is to order a federal inspection of the mine site. *Id.* Violations that threaten imminent environmental harm are to be halted by a cessation order from the Secretary. Act § 521(a)(2).

The Secretary's oversight function is shared in part by the public, which is given the right to sue in federal court, to compel compliance with the state program and its permits. Act § 520. Both the Secretary and the public have access to a large body of information, including nonconfidential permit application information, to facilitate this enforcement role. Act §§ 507(e), 517(f); *see* 30 C.F.R. § 840.14 (1979).

The Secretary's ultimate power over lax state enforcement is set out in section 521(b) of the Act. When the Secretary determines that violations result from a state's lack of intent or capability to enforce the state program, he is to enforce permit conditions directly, and to take over the entire permit-issuing process himself.

Direct intervention by the Secretary in the operation of state regulatory programs is clearly intended as an extraordinary remedy. *See* H.R. REP. No. 218, 95th Cong., 1st Sess. 129 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 661. The Secretary's primary means of guaranteeing effective state programs lies in his approval function at the beginning of the process.

A state wishing to take over regulatory responsibility for administering the Act within its borders must submit a proposed state program to the Secretary for his

approval. Act § 503. The Secretary may only approve a program if he determines that the state "has the capability of carrying out the provisions of this Act and meeting its purposes." Act § 503(a). The proposed state program must include "a State law which provides for the effective implementatio[n], maintenance, and enforcement of a permit system," Act § 503(a)(4), and "rules and regulations consistent with regulations issued by the Secretary pursuant to this Act," Act § 503(a)(7). The Secretary is required to hold a public hearing, to solicit the views of other federal agencies, and to obtain the written concurrence of the Environmental Protection Agency with respect to certain aspects of the state program. Act § 503(b).

C. *Congressional Intent and the Tradition of State Regulation*

A major premise of appellant's argument is that Congress deliberately minimized the federal role in administration of the Act out of deference to state prerogatives. Appellant denies that the statute is based primarily on environmental concerns, and insists that an "even more fundamental purpose of the Act . . . is to preserve the federal structure of our nation and to leave with the states primary responsibility for this land-use regulation."[9] Congress' special solicitude for the states' traditional role in controlling local land use, appellant claims, prevented Congress from delegating to the Secretary authority to dictate permit information requirements to the states.

Our own examination of the Act and its legislative history reveals a very different congressional assessment of the tradition of state surface mining regulation. The legislative history contains significant expressions of con-

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[9] Appellant's Supplemental Memorandum on Appeal at 4.

gressional dissatisfaction with state mining regulation practices:

> [D]espite claims from some quarters that state reclamation laws have improved so significantly that Federal mining standards are no longer needed, the hearing record abounds with evidence that this is simply not the case. For a variety of reasons, including the reluctance of the State to impose stringent controls on its own industry, serious abuses continue.

H.R. REP. NO. 218, 95th Cong., 1st Sess. 58 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 596. Congress preferred to leave primary governmental responsibility with the states "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations," Act § 101(f), but skepticism about the states' willingness to implement the federal program justified the Secretary's continuing oversight role.

> While it is confident that the delegation of primary regulatory authority to the States will result in adequate State enforcement, the committee is also of the belief that a limited Federal oversight role as well as increased opportunity for citizens to participate in the enforcement program are necessary to assure that the old patterns of minimal enforcement are not repeated.

H.R. REP. NO. 218, 95th Cong., 1st Sess. 129 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 661.

Congress announced its willingness, "wherever necessary, [to] exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." Act § 102(m). Nationwide standards were

"essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." Act § 101(g).[10] Congress' concern about the states' ability to withstand economic temptation extended to the very area of permit information with which we are dealing:

> Experience has shown that without a thorough and comprehensive data base presented with the permit application, and absent analysis and review both by the agency and by other affected parties based upon adequate data, th[i]s judgment has often traditionally reflected the economic interest in expanding a State's mining industry. Valid environmental factors tend to receive short shrift.

H.R. REP. No. 218, 95th Cong., 1st Sess. 91 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 627.

Thus, the legislative history of the Act, the declarations of congressional purpose it contains, and the allocation of authority it creates between the Secretary and the states confirm that Congress was not interested in perpetuating the existing tradition of state mining regulation, and that Congress saw the need for both federal standards and federal oversight to guarantee an effective change. Congress did not withhold powers that the Secretary might require in his efforts to safeguard federal interests.[11]

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[10] The prevention of this kind of destructive interstate competition is, of course, a traditional role for Congress' power under the Commerce Clause. *See, e.g., United States* v. *Darby*, 312 U.S. 100, 121-23 (1941).

[11] We note that, during the Senate debates on the Act, Senators Johnston and Domenici introduced what they referred to as "the

III. The Source of the Secretary's Rulemaking Power

The Secretary identifies two grants of rulemaking power in the Act as the source of his authority to promulgate regulations expanding the list of information required to be submitted in permit applications. The first of these provisions is a general rulemaking grant typical of statutes that, like the Act, delegate extensive responsibilities to administrative agencies.[12] It provides

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States rights amendment." 123 CONG. REC. 15,581 (1977). The amendment would have freed the states from compliance with all other provisions of Title V of the Act so long as they enacted environmental performance standards at least as stringent as those contained in Act §§ 515, 516. The states' rights amendment was defeated, 51 votes to 39. 123 CONG. REC. 15,591 (1977). Appellant's "federalism" argument resembles to some extent an attempt to attribute the intent embodied in this amendment to the Congress that rejected it.

We also observe that appellant urged, earlier in this appeal, that the Senate's passage of a bill that would have freed the states from their obligation to conform to the Secretary's regulations was "entitled to some consideration" as proving "that Congress meant what it said" in section 507. Appellant's Brief on Appeal at 28. That bill has since died, and appellant professes to have emerged "with renewed respect [for] the settled rule that post-enactment history is not a useful guide to Congressional intention," *i.e.*, that the failure of Congress to pass the bill does not weigh against their argument. Appellant's Supplemental Brief on Rehearing En Banc at 18. We agree that the intent of the 95th Congress is determinative in interpreting the Act as passed in 1977; evidence of that intent is not to be sought in actions taken or not taken by subsequent Congresses. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

[12] *See, e.g.*, § 105 of the Truth in Lending Act, 15 U.S.C. § 1604 (1976):

> The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of

that the Secretary shall "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act," Act § 201(c)(2). The second source is a more specific rulemaking grant, tied to the provisions of title V of the Act, in which the permit provisions are found. It requires the Secretary to

> *promulgate and publish in the Federal Register regulations* covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and con-

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transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith;

§ 303(r) of the Communications Act of 1934, 47 U.S.C. § 303(r) (1976):

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> . . . .
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexted thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party;

§ 501 of the Federal Water Pollution Control Act, 33 U.S.C. § 1361 (1976):

> The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

Interpretations of the scope of these provisions may be found in *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), *F.C.C.* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 793 (1978), and *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132-33 (1977), respectively. *See also* note 15 *infra*.

> forming to the provisions of title V and *establishing procedures and requirements for preparation, submission, and approval of State programs* and development, and implementation of Federal programs under the title.

Act § 501(b) (emphasis added).[13]

A. *The Secretary's Interpretation*

The Secretary has cited sections 201(c) and 501(b) of the Act as authority for his rulemaking, and has viewed them as empowering him to expand the permit information requirements beyond those specified in the Act. As Congress recognized, "[t]he informational and environmental requirements of this [Act] are its most vital provisions." S. REP. No. 128, 95th Cong., 1st Sess. 53 (1977). The importance of an adequate data base to state decisionmaking, federal supervision, and citizen oversight makes the state program's information-gathering provisions crucial to the success of the Act. The Secretary has concluded that the explicit information provisions included in the Act should be supplemented to guarantee its effective implementation. As the interpretation favored by the agency responsible for administering the Act, this conclusion is entitled to some deference. *See Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979). Absent a contrary indication in the statute, we should accept the Secretary's judgment, for it is not

> a reasonable canon of interpretation [to assume] that the draftsmen of acts delegating agency pow-

[13] Section 507(b) requires the permit application to "contain, among other things," the items listed in its numbered paragraphs. This language demonstrates that Congress never intended to prohibit the administrators of the Act from seeking information beyond that specified in the statute, but it does not clarify the distribution of power between the Secretary and the states. We do not view section 507(b) itself as a grant of power to the Secretary.

> ers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. . . . [This] is precisely one of the reasons why regulatory agencies . . . are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess.

American Trucking Ass'ns v. *United States*, 344 U.S. 298, 309-10 (1953).

Deference to the administering agency is particularly appropriate when a complex regulatory statute emerges from a process of difficult legislative gestation. The Surface Mining Act was the result of a protracted effort, dating back to the Ninetieth Congress, and including presidential veto of bills passed by the Ninety-third and Ninety-fourth Congresses.[14] From such a process of compromise and adjustment, a symmetrical statute containing explicit answers to every question of administrative implementation is unlikely to emerge.

Appellant would insist that deference is due, not to the Secretary, but to the individual state regulatory agencies that bear primary responsibility for enforcement of the Act. Appellant views this "primary" responsibility as paramount and final responsibility. Our examination of the Secretary's approval and oversight roles convinces us that this argument misconstrues the statute. Once a state program has been approved, the state regulatory agency plays the major role, with its greater manpower and familiarity with local condition. It exercises front line supervision, and the Secretary will not intervene unless its discretion is abused. But ultimate responsibility for guaranteeing effective state enforcement of

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[14] *See* H.R. REP. No. 218, 95th Cong., 1st Sess. 57-61 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 595-99.

uniform nationwide minimum standards lies with the Secretary, and his duty to disapprove proposed state programs that he considers ineffective may not be obstructed by a policy of judicial deference to the state agencies proposing those programs. This is particularly true when it comes to seeking the information from the permittees on which his oversight will be based.

B. *Interpretation of the Rulemaking Provisions*

Appellant argues that the sections of the Act on which the Secretary relies for his rulemaking powers confer no substantive authority at all, and must instead be interpreted as routine housekeeping and procedural provisions. We disagree.

Section 201(c)(2) of the Act empowers the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." Appellant urges that the Secretary's interpretation of section 201(c)(2) would give him unlimited power to enact rules, destroying the intended structure of the Act by drowning the states in a sea of irrelevant and time-consuming regulations. But as this court observed of the Clean Air Act's similar rulemaking grant,[15] "[s]uch a provision does not provide the Administrator with *carte blanche* authority to promulgate any rules, on any matter relating to the . . . Act, in any manner that the Administrator wishes." *Citizens to Save Spencer County* v. *E.P.A.*, 600 F.2d 844, 873 (D.C. Cir.

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[15] Section 301(a)(1) of the Clean Air Act, 42 U.S.C. § 7601(a)(1) (Supp. I 1977), provides:

> The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations, as he may deem necessary or expedient.

1979). The Secretary's regulations must not be arbitrary, capricious, or inconsistent with the Act, and section 526(a)(1) of the Act provides for review of the individual regulations on that basis in the district court. Appellant is participating in that process in the district court, and nothing we decide today forecloses appellant's challenges to individual regulations.

Appellant's other argument against the Secretary's interpretation of section 201(c)(2) is a quantitative one. Because the Act contains, in addition to section 201(c)(2), twenty-one *specific* grants of rulemaking power, appellant maintains either those specific grants or section 201(c)(2)'s general grant must be redundant—and the 21:1 ratio in favor of the specific grants demonstrates that it is the interpretation of section 201(c)(2) that is erroneous. Rather than conferring general rulemaking power, in appellant's view, that section merely empowers the Secretary to engage in "routine housekeeping," such as setting up rules for distribution of government funds, and allocating authority among his employees. Appellant urges as a proposition of administrative law that the existence of specific grants must eviscerate a general grant of rulemaking power. That proposition cannot be squared with recent Supreme Court decisions relying on general rulemaking grants to uphold rulemaking authority despite the presence of specific grants in the statutes scrutinized. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132 (1977) (general rulemaking grant in § 501 of Federal Water Pollution Control Act, 33 U.S.C. § 1361 (1976), supports issuance of categorical effluent limitations under § 301, 33 U.S.C. § 1311 (1976), despite explicit specific rulemaking grants in, *e.g.*, §§ 303, 304, 306, and 307, 33 U.S.C. §§ 1313, 1314, 1316, 1317 (1976)); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) (general rulemaking grant in § 105 of the Truth in Lending Act, 15 U.S.C. § 1604 (1976), supports prophylactic "Four Installment Rule," despite

explicit specific rulemaking grants in, *e.g.*, §§ 123, 125, 126, and 127, 15 U.S.C. § 1633, 1635, 1636, 1637 (1976)).

The Secretary also relies on section 501(b) of the Act as support for his authority. This section directs the Secretary to promulgate regulations "establishing procedures and requirements for preparation, submission, and approval of State programs." Appellant insists that the evident meaning of this section is that the Secretary may set out "mechanical and procedural provisions" governing formal aspects of the submission and approval process. Appellant's Supplemental Brief on Rehearing En Banc at 28.

We recognize that the language of section 501(b) is not entirely lucid, but the Secretary's reading is a reasonable one, and is supported by the use of similar language in another provision of the Act. Section 405 deals with state submission of plans for reclamation of abandoned mines, and requires the Secretary to

> promulgate and publish in the Federal Register regulations covering implementation of an abandoned mine reclamation program incorporating the provisions of title IV and *establishing procedures and requirements for p[re]paration, submission, and approval of State programs* consisting of the plan and annual submissions of projects.

Act § 405(a) (emphasis added). Section 405(d) instructs the Secretary to turn over exclusive responsibility for reclamation programs to the states if they submit an acceptable program. The Secretary is to "monitor the progress and quality of the program," Act § 405(i), and he

> shall withdraw such approval and authorization if he determines upon the basis of information provided under this section *that the State program is*

> *not in compliance with the procedures, guidelines, and requirements established under subsection 405 (a).*

Act § 405(d) (emphasis added). This continuing duty to withdraw approval of noncomplying state programs provides the Secretary's only power to revoke the state's authorization to administer the reclamation program. It would be unreasonable to assume that this severe sanction was intended to be invoked when the Secretary realizes that in approving the program initially he had overlooked a procedural defect, but not when experience demonstrates that the state is conducting an inadequate program. The clear implication of the language of section 405(d) is that the Secretary has authority under section 405(a) to establish procedures and requirements that have substantive content beyond the specification of procedural formalities for submission of state programs. It is therefore quite reasonable to read the identical language in section 501(b) as granting equally substantive powers.

Appellant offers only one argument in favor of its own reading of section 501(b). This is a variant of the reductio ad absurdum suggested in connection with section 201(c)(2). Appellant urges that if the Secretary does have rulemaking authority in the area of program approval, he can dictate every detail of the states' programs, and thereby destroy their role in flexible implementation of the Act. But as we have pointed out earlier, the power to issue regulations is not the power to issue *any* regulations. The Secretary has no more *carte blanche* under section 501(b) than he has under section 201(c)(2).

Appellant's misconception of the role of section 501(b) is based on a more fundamental misunderstanding. Appellant has argued in its briefs and at oral argument that even if the Secretary may withhold approval of a

state program because its permit information requirements fail to include necessary items not explicitly required by the Act, he may not advise the states of his additional requirements by regulation. Instead, he must proceed by adjudication on a case-by-case basis. Appellant's view cannot be reconciled with a significant body of case law favoring the use of rulemaking where agencies have adjudicatory power over the subject and at least some rulemaking authority.

In *National Petroleum Refiners Ass'n* v. *F.T.C.*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), this court upheld the power of the FTC to issue substantive rules governing its adjudications. Examining a line of cases including *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), the court recognized an "obvious judicial willingness to permit substantive rulemaking to undercut the primacy of adjudication in the development of agency policy." 482 F.2d at 679. The court praised the agency's use of rulemaking as a method for announcing new norms of conduct:

> [T]here is little question that the availability of substantive rule-making gives any agency a valuable resource-saving flexibility in carry out its task of regulating parties subject to its statutory mandate. More than merely expediting the agency's job, use of substantive rule-making is increasingly felt to yield significant benefits to those the agency regulates. Increasingly, courts are recognizing that use of rule-making to make innovations in agency policy may actually be fairer to regulated parties than total reliance on case-by-case adjudication.

Id. at 681. This approbation may also be seen in a large body of cases that have rejected claims that a given agency may operate only on a case-by-case basis, and

have likewise rejected crabbed interpretations of those agencies' rulemaking powers. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-35 (1977) (national effluent limitations permissibly imposed by regulation on state-issued permits under § 301 of the Clean Water Act); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 619-21 (1973) (Food and Drug Administration may deny efficacy hearings to manufacturers who have not undertaken adequate clinical investigations conforming to regulations); *cf. Permian Basin Area Rate Cases*, 390 U.S. 747, 774-77 (1968) (area rates rather than individual natural gas rates may be set by Federal Power Commission).

The rationale of *National Petroleum* and kindred cases lends additional strength to our conclusion that both sections 201(c)(2) and 501(b) of the Surface Mining Act authorize the Secretary to issue rules governing approval of state programs. Appellant's arguments in favor of a trivializing construction of these provisions are wholly without merit. The only remaining question is whether some other evidence demonstrates that Congress intended to exclude from the Secretary's authority the power to require permit information that he determines to be necessary to an effective program.

C. *"Common Sense" and Exhaustion*

Appellant's most significant argument against the Secretary's rulemaking power is the claim that, even if the Secretary has some authority to promulgate criteria for the approval of state programs, the explicit permit application provisions of the Act were intended as the exclusive federal list of necessary data. Appellant deduces this limit on the Secretary's power from two premises—a "common sense" rule of regulatory authority, and the exhaustive length and detail of the explicit statutory provisions.

Appellant insists that granting the Secretary the power to expand the permit information requirements would defy common sense: "The Congress cannot reasonably be supposed to have created an administrative structure so bizarre that the agency which has the exclusive power to decide the issues is powerless to determine the information which it needs to reach that decision." Appellant's Supplemental Brief on Rehearing En Banc at 24. Because the state regulatory authority has the power, not subject to federal review, to make permit-issuing decisions, the state must have the power to specify the information that applicants submit.

Of course, the superficial appeal of this "common sense" argument is somewhat undercut when we recognize that the Secretary has only purported to promulgate *minimum* information requirements, and has not sought to limit the state's ability to require *further* data from applicants. And appellant must admit that the Act itself grossly violates this maxim: subsection 507(b) alone contains seventeen numbered paragraphs specifying information that the state regulatory authority *must* require.

The conclusive answer to appellant's "common sense" argument, however, is that even if individual state permit decisions are unreviewable, the state's overall performance in administering the Act is not. Congress believed that guaranteeing effective state enforcement required the vigilance of both the Secretary and the public, and so provided that permit applications, as well as inspection reports, must be available to the public. Act §§ 507(e), 517(f). Since the Secretary must use the information submitted with permit applications in evaluating the continuing compliance of the state permit process with the Act, there is nothing "bizarre" about allowing the Secretary to tell the states that they need more information to meet their responsibilities.

Appellant next argues that sections 507 and 508 of the Act are carefully devised, limited exceptions to the "common sense" rule, and that they were clearly intended to exhaust federal intervention into the information-gathering process. But the Act itself and its legislative history do not demonstrate such an intent.

We have already observed in passing that, although appellant refers to sections 507 and 508 as the only information requirements of the Act, other scattered sections in title V also demand information from permit applicants. *See* note 3 *supra*. This technical observation is relevant here, because it tends to rebut the suggestion that sections 507 and 508 comprise a compact, meticulous listing of all the information that Congress considered essential for permit decisionmaking. The addition of other information requirements in scattered sections suggests ad hoc responses to perceived needs for data rather than an integrated effort to produce a comprehensive list.[16]

The House Committee report contains a more plausible explanation of the function sections 507 and 508 were intended to serve. After discussing the need for a "thorough and comprehensive data base" in language we have already quoted, the report continues: "To meet this problem the bill delineates in detail *the type of informa-*

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[16] Even the list in section 507 itself was not the product of a unified analytic effort. Subsection 507(g), for example, requiring submission of a "blasting plan" with the permit application, was not a feature of the bill vetoed by President Ford in 1975, or of the version reported by the Senate Committee on Energy and Natural Resources in 1977. *See* H.R. REP. No. 189, 94th Cong., 1st Sess. 26-29 (1975) (conference report); S. REP. No. 128, 95th Cong., 1st Sess. 16-18 (1977). It was added by a Senate floor amendment, to conform with the bill reported by the House Committee on Interior and Insular Affairs and passed by the House. *See* 123 CONG. REC. 15,741 (1977); H.R. REP. No. 218, 95th Cong., 1st Sess. 23 (1977).

tion required in permit applications in sections 507 and 508 and the criteria for assessing the merits of the application in section 510." H.R. REP. No. 218, 95th Cong., 1st SESS. 91 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 622 (emphasis added). Because of the importance of information to a proper decision by the regulatory authority and to effective oversight by the Secretary, Congress included a detailed list of the *type* of information that would have to be at the state's disposal. Such a list is not necessarily exhaustive, and does not necessarily represent Congress' judgment that the states should be free to decide for themselves whether to seek any other information.

The Act itself contains a persuasive counterexample to the suggestion that detailed enumerations must be exhaustive. Section 515 spells out the Act's central environmental performance standards. Counting the pages in *Statutes at Large*, we find that section 515 is roughly twice the length of sections 507 and 508 combined. Section 515(b) alone contains twenty-five numbered paragraphs containing directives as specific as "[to] refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water," Act § 515(b)(18). Yet the legislative history makes absolutely clear the expectation that the Secretary would flesh out these requirements in his regulations:

> The committee believes that it has struck a balance between legislation which merely frames performance standards in terms of general objectives and standards which are cast in terms more detailed than those generally found in regulatory legislation. In choosing a middle path, the committee is mindful of the past failures on the State level and thus bases its approval of H.R. 2 on the expectation that Federal regulations promulgated under the act will fully im-

> plement the environmental performance standards. Obviously, the mere reproduction of the statutory environmental performance standards in the regulations would be inadequate.

H.R. REP. No. 218, 95th Cong., 1st Sess. 85 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 622. Although the legislative history does not contain a similar exhortation regarding permit applications, we cannot conclude that the mere length or specificity of portions of sections 507 and 508 manifests a desire to exclude the Secretary's rulemaking powers from their domain.

The Act contains numerous generally phrased and specifically detailed limitations on the freedom of surface mine owners to operate as they please. Some of these limitations are reflected in the permit application provisions, and some are not; the legislative history does not enlighten us as to the reasons for Congress' selectivity. Appellant would have us rule that the statutory list is exhaustive, and that the Secretary never has the power to supplement that list when he concludes that further information is needed for the proper administration of the Act. We find that sections 507 and 508 represent a diligent and comprehensive congressional effort to guide the Secretary with respect to the type of information a permit application should require. Appellant has not demonstrated a congressional intent to make these provisions an exclusive federal list.

IV. CONCLUSION

The Surface Mining Control and Reclamation Act of 1977 enacts a national plan to alleviate the harmful effects of surface mining. Because of past failures on the state level, the Act provides for national standards relating to environmental performance, and federal oversight of the state programs applying those standards to

local geographic conditions. Before the Secretary may approve a state program, he must conclude that the program is sufficient to carry out the purposes of the Act.

We hold that the Act does grant the Secretary rulemaking power enabling him to specify by regulation criteria necessary for his approval of a proposed state program. We hold that the Act's explicit listings of information required of permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act. This question concerning the existence of the Secretary's authority is the only question decided and appellant is free to continue to contest the specific regulations in the district court. The judgment of the district court is

Affirmed.

TAMM, *Circuit Judge, dissenting*: We are confronted in this case with interpreting an act of Congress whose linguistic excesses make its exact meaning seemingly difficult to ascertain. Those difficulties impel my brethren of the majority, however, to lose sight of the congressional objective. I believe that it is not necessary to rely on remote inferences to ascertain the obvious design of the legislation. It is not necessary to draw upon a legal stamp collection, to utilize ideological mutations, or to create a legal "bodyguard of definitions, conclusions, corollaries, propositions explicit and propositions implicit" [1] to determine the intent of the Congress and the purpose of the Act. No amount of legal acrobacy can dispel the actual wording of the statute in placing prime responsibility in the states for primarily programming the coal mining regulations. In the hope that the reasoning set out hereafter will magnetize legal scholars to a true appreciation of the law as Congress actually intended it to be, I set out my interpretation of the statute under consideration. In some areas I shall be required to enter already well plowed fields.

In this appeal from a partial final judgment of the United States District Court for the District of Columbia, we must determine whether the Secretary of the Interior may prescribe minimum requirements for coal-mining permit applications that states must adopt before they can assume authority for regulating coal mining within their borders pursuant to the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Act), 30 U.S.C. §§ 1201-1328 (Supp. I 1977). I conclude that the Secretary lacks the power to demand that states require applicants to provide more information than that specified in sections 507 and 508 of the Act, 30 U.S.C. §§ 1257-1258. Therefore, I would reverse the judgment of the district court and remand the case

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[1] Erasmus, as cited in A. Koestler, THE SLEEPWALKERS (1959).

with instructions to remand the regulations at issue to the Secretary.

I.

Congress adopted the Surface Mining Act in an effort to balance the need for coal in satisfying the nation's energy requirements against the environmental dangers posed by mining operations. *See* Act § 102, 30 U.S.C. § 1202. Congress also concluded that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . . ." *Id.* § 101(f), 30 U.S.C. § 1201(f). Congress carefully devised a statutory scheme that would take all these concerns into account. As we recently noted:

> The Act provides a truly federalist distribution of regulatory authority for the coal-mining industry. After a transition period of direct regulation under the Secretary of the Interior, each state in which coal is mined has the option of submitting to the Secretary its own program for supervising mining and reclamation within its borders. Act § 503, 30 U.S.C. § 1253. The Secretary, after following certain procedures, must approve the program if he finds it adequate to protect environmental concerns that lay behind the adoption of the Act. Once its plan is approved, the state assumes responsibility for enforcing the Act. *Id.* If a state fails to submit a satisfactory program, or if it does not wish to assume jurisdiction over mining within its borders, the Secretary must devise a program for that state suited to its particular needs. *Id.* § 504(a), 30 U.S.C. § 1254(a). Whether regulation is in federal or state hands, a firm wishing to engage in surface mining must obtain a permit from the regulatory authority before it may begin or continue its operations. *Id.*

§ 506(a), 30 U.S.C. § 1256(a). The Act spells out in detail the minimum information that an applicant must submit to the regulatory authority to accompany its permit request. *See id.* § 507(b), 30 U.S.C. § 1257(b).

In re Permanent Surface Mining Regulation Litigation, 617 F.2d 807, 808 (D.C. Cir. 1980) (per curiam) (appeal from denial of preliminary injunction).

In March of 1979, the Secretary issued permanent regulations under the Act. *See* 44 Fed. Reg. 14902, 15312-463 (1979) (codified at 30 C.F.R. pts. 700-890 (1979).[2] Among these rules are specifications for the minimum information that a state must require in a permit application before the Secretary will approve the state's program and allow it to assume control of mining within its borders. *See* 30 C.F.R. pts. 778-784. These requirements are much more detailed than the information the Act itself prescribes for applicants to submit to the appropriate regulatory authority. *Compare id. with* Act §§ 507-508, 30 U.S.C. §§ 1257-1258.[3]

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[2] Many of the parties to the present litigation in the district court also challenged the Secretary's interim regulations promulgated under §§ 501-502 of the Act, 30 U.S.C. §§ 1251-1252. *See* In Re Surface Mining Regulation Litigation, 627 F. 2d 1346 (D.C. Cir. 1980), *aff'g in part, rev'g in part, and remanding* 452 F. Supp. 327, 456 F. Supp. 1301 (D.D.C. 1978).

[3] Numerous provisions of the regulations go far beyond the language of §§ 507 and 508. For example, the rules specify that maps filed with a permit application must identify the uses of existing buildings and the location of roads, cemeteries and Indian burial grounds, park trails, and areas listed or eligible for listing in the National Register of Historic Places. 30 C.F.R. §§ 779.24(d),(h)-(k), 783.24(d),(h)-(k). The Act does not require submission of this information. *See* Act § 507(b)(13), 30 U.S.C. § 1257(b)(13). Under the regulations, the applicant also must list all other permits needed to conduct the proposed mining activities and include in the list the name and address of the regulating authority, permit identification numbers, and the pres-

Various mining states, firms, and trade associations filed a total of nine actions in the United States District Court for the District of Columbia challenging most aspects of the Secretary's permanent regulations, including the information requirements. The district court consolidated these cases and divided the issues involved into two groups, one involving statutory and other general questions and the other involving disputes on the record. The court then refused to enter a preliminary injunction against enforcement of the permit application rules. On appeal, this court affirmed the denial of interim relief as being within the district judge's discretion. *In re Permanent Surface Mining Regulation Litigation*, 617 F.2d 807 (D.C. Cir. 1980) (per curiam), *aff'g* Civ. No. 79-1144 (D.D.C. Aug. 21, 1979) (order denying preliminary injunction). In the process, we stated that we were intimating no view on the merits of those appellants' claims. *Id.* at 809.

Since our January opinion, the district court has reached its decision on the first group of issues. As part of its opinion, the district court concluded that "the structure of the Act, the general grants of rulemaking authority, and Section 501(b) support the Secretary's power" to promulgate minimum requirements for permit applications under state programs that exceed the infor-

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ent status of these other permit applications. 30 C.F.R. §§ 778.19, 782.19. The applicant must describe existing structures and provide maps identifying the location of various buildings, facilities, and operational areas to be used in mining activities. *Id.* §§ 780.14, 784.14. The applicant's reclamation plan must describe stream diversions, impacts on parks and historic places, road relocations, disposal of excess wastes, and transportation facilities. *Id.* §§ 780.29-38, 784.17-.19, .22. The Act has no comparable provisions for any of the foregoing requirements either. *See* Act §§ 507-508. Likewise, the regulations specify in great detail what the blasting plan required under § 507(g), 30 U.S.C. § 1257(g), must include. 30 C.F.R. §§ 780.13, 784.13.

mation required under the Act. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, at 31 (D.D.C. Feb. 26, 1980) (memorandum and order), [hereinafter cited as District Court Opinion].[4] *See generally id.* at 30-33. On the motion of Peabody Coal Company, the district court found no just reason to delay entering judgment on this issue and, on March 17, entered a final judgment on the validity of these rules. *See generally* FED. R. CIV. P. 54(b). Peabody, a party to the earlier appeal regarding the preliminary injunction, filed this appeal. To ensure a prompt disposition of the significant question presented, this court granted expedited consideration before the division of the court which heard the appeal concerning preliminary relief.

II.

A.

I begin my effort to construe the Secretary's powers under the Surface Mining Act by examining the language of the Act itself. *See e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Zerilli* v. *Evening News Association*, 628 F.2d 217 (D.C. Cir. 1980). The Secretary relies primarily on two provisions to demonstrate that Congress granted him authority to issue minimum standards for state permit applications. I do not believe these sections are so clear as the Secretary contends.

The first of the two provisions, section 201(c)(2), authorizes the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act . . . ." 30 U.S.C. § 1211(c)(2). The Secretary asserts that this clause is a grant of general rulemaking power that enables him to impose additional information requirements for permit applications. I have two problems with this analysis.

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[4] For the text of § 501(b), 30 U.S.C. § 1251(b), see page 6 *infra*.

First, section 201(c)(2) itself states that the regulations must "be necessary to carry out the purposes and provisions of this Act . . . ." This language still begs the question of whether prescribing additional information requirements for states to demand in permit applications is consistent with the Act. I am thus left precisely where I began. Second, I am not satisfied with either party's invocation of the long-standing canon of statutory construction that an act's provisions should be read so as to render none superfluous. *See generally* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. C. Sands 1973). Peabody initially argued that reading section 201(c)(2) as a grant of general rulemaking authority makes the twenty specific grants in the Act meaningless. The district court turned this proposition around to hold that reading section 201(c)(2) otherwise makes it superfluous. *See* District Court Opinion at 32. In short, any broad reading of the Act's rulemaking provisions will make section 201(c)(2) redundant of the specific grants or vice versa. I cannot base a decision on a method of statutory construction that, when applied to this Act, is so hopelessly circular. *Cf. American Radio Relay League, Inc.* v. *FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) (courts will not give independent meaning to a word that, in context, appears to be simply surplusage).

Section 501(b) of the Act gives me more pause. It empowers the Secretary to "promulgate and publish . . . regulations . . . establishing procedures and *requirements* for preparation, submission, and *approval* of State programs . . . ." 30 U.S.C. § 1251(b) (emphasis added). This language can be read to allow regulations detailing minimum standards that all state programs must meet to receive the Secretary's approval. Equally plausible, however, is a construction that allows these requirements to pertain only to areas in which the Act otherwise allows the Secretary to set nationwide performance standards for states to enforce. *See* Act §§ 515-516, 30 U.S.C.

§§ 1265-1266.[5] Alternatively, section 501(b) could pertain only to nonsubstantive requirements for processing state programs through the Secretary's office. In any event, the language of the statute "is hardly free from ambiguity, and there is no clear literal meaning that we are bound to give effect." *United States* v. *Davis*, 617 F.2d 677 (D.C. Cir. 1979).[6]

B.

I next turn to the Act's legislative history in the hope that it will shed some light on the statute's words. Unfortunately, this, too, is a blind alley. The Senate report, the House report, the conference report, and the floor debate are all silent on whether the Secretary may add application specifications beyond those enacted in sections 507 and 508.

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[5] Peabody, in its initial brief filed in conjunction with the appeal of the denial of preliminary relief, conceded that the Secretary may issue regulations establishing nationwide performance standards under §§ 515 and 516 of the Act, 30 U.S.C. §§ 1265-1266. *See* In re Permanent Surface Mining Regulation Litigation, 617 F.2d 807 (D.C. Cir. 1980), Joint Brief of Appellants at 7, 19. I assume, but do not decide, that this construction is correct.

[6] The Secretary relies less heavily on two other provisions of the Act. The first is the requirement that states demonstrate they have "the capability of carrying out the provisions of this Act and meeting its purposes through . . . (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." Act § 503(a), 30 U.S.C. § 1253(a). The second defines "State program" as meaning "a program established by a State pursuant to section 503 . . . in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act . . . ." *Id.* § 701(25), 30 U.S.C. § 1291(25). These clauses have the same problem of circularity I found with § 201(c)(2), as discussed in the text: the state must conform only to those regulations that are consistent with the Act, so we still must decide whether these particular regulations conform to the Act's purposes.

The Secretary at one point refers us to the House report's discussion of section 501(b). This passage states, in full: "Subsection (b) gives the Secretary up to 1 year to promulgate regulations to implement the full regulatory program including technical requirements, permits process[es], and procedures for submission of State programs." H.R. REP. No. 95-218, 95th Cong., 1st Sess. 62 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 601. Once again, I do not believe this language is clear at all. The single sentence appears in a short summary of section 501 and simply describes section 501(b) as giving the Secretary rulemaking power for the "full regulatory program," then lists specific examples. It does not purport to define what the "full regulatory program" and its limits are. To determine what the Secretary may do in relation to "technical requirements, permit process[es], and procedures for submission of State programs," as well as other areas, one still must turn to the substantive provisions of the Act that allocate authority between the Secretary and state regulatory agencies. The Secretary, the parties agree, is empowered to establish technical performance standards.[7] Likewise, he clearly has full control over the permitting process in two instances: mining on federal land, *see* Act § 523, 30 U.S.C. § 1272, and mining in states that do not submit satisfactory regulatory programs, *see id.* § 504, 30 U.S.C. § 1254. I still must decide how much further his authority over the permitting process extends—in particular, how control over permitting is allocated between the Secretary and the state regulatory authority when the state wishes to assume responsibility for mining within its borders.

III.

With no clear meaning arising from the language of the Act itself or Congress's discussion of it. I must now

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[7] *See* note 5 *supra*.

look broadly at the Act's purposes and structure to decide which approach is more faithful to Congress's overall design. *See, e.g., United States* v. *Bornstein*, 423 U.S. 303, 310 (1976). My examination indicates that Congress intended to vest in the states primary regulatory and decisionmaking authority and to place the Secretary in an oversight role to ensure that the states provide some minimal level of regulation and control. From there, I conclude that the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to determining whether the states have satisfied that minimum. With this understanding, I would hold that the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out.

A.

Congress listed among the purposes of the Act a desire to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations . . . ." Act § 102(a), 30 U.S.C. § 1202(a). It nonetheless found that due to variations in local conditions, "*primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . . .*" *Id.* § 101(f), 30 U.S.C. § 1201(f) (emphasis added). The federal government, of course, "*assist*[*s*] *the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements of the Act, and at the same time, reflect local requirements and local environmental and agricultural conditions . . . .*" *Id.* § 201(c)(9), 30 U.S.C. § 1211(c)(9) (emphasis added). *Accord, id.* § 102(g), 30 U.S.C. § 1202(g). The overall structure thus is one in which the Act will "*be enforced by the State*[*s*] *with backup authority in the Department of the Interior.*" H.R. REP. NO. 95-218, *supra* at 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 595

(emphasis added). *See id.* at 129 ("primary regulatory authority" delegated to states with "a limited Federal oversight role" in the enforcement program), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 661.

The Act's allocation of authority reflects these aims. Under an approved state program, the local regulatory authority decides whether to issue permits for coal mining. Act § 510, 30 U.S.C. § 1260. The state authority must operate within certain boundaries prescribed by the Act, and its determination whether to grant a permit request is reviewable in state courts, *id.* § 526(e), 30 U.S.C. § 1276(e), but the Secretary is not involved in this process.[8] Only if the state authorities subsequently fail to enforce their local program may the Secretary assume control of mining within that state, and he may do so then only after following certain procedures in which the state participates. *Id.* § 521(b), 30 U.S.C. § 1271(b). This scheme leaves broad discretion in state officials while ensuring, through federal oversight, that the minimum requirements of the Act are achieved.[9]

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[8] While the bill that became the Surface Mining Act was pending, Secretary of the Interior Cecil K. Andrus wrote to Representative Morris K. Udall, chairman of the House committee considering the bill, and asked in part that his Department be given authority to intervene in the permit process. *See* H.R. REP. No. 95-218, 95th Cong., 1st Sess. 156 (1977) (letter from Sec'y Andrus to Rep. Udall), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 687. Congress apparently rejected this request.

[9] The Secretary insists that he has left this discretion intact through the so-called "state window" provision in the regulations. This section allows states to propose alternatives that are "consistent with the regulations" the Secretary has issued. 30 C.F.R. § 731.13(c)(1). The language of this provision, however, is deceptively comforting. Elsewhere, the regulations define "consistent with" as meaning "no less stringent than and meet[ing] the applicable provisions of the regulations the Secretary has issued. *Id.* § 730.5(b). Thus, there is little room for states to maneuver. The "window" would be more accurately described as a one-way mirror.

B.

Ordinarily, logic dictates that the entity vested with the power to make a given decision implicitly is left with the power to determine what information it needs to make that decision. In the case of state regulatory authorities, however, Congress wished to make sure that the permit-granting entities would have adequate information:

> Experience has shown that without a thorough and comprehensive data base presented with the permit application, and absent analysis and review by both the agency and by other affected parties based upon adequate data, [this] judgment has often traditionally reflected the economic interest in expanding a State's mining industry. Valid environmental factors tend to receive short shrift. To meet this problem *the bill delineates in detail the type of information required in permit applications* in sections 507 and 508 *and the criteria for assessing the merits of the application* in section 510.

H.R. REP. NO. 95-218, *supra* at 91, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 627 (emphasis added). These informational specifications are the "minimum uniform requirements" that all states must demand of permit applicants. S REP. NO. 95-128, 95th Cong., 1st Sess. 53 (1977).

That Congress chose to mandate a minimum amount of information in permit applications does not mean that it intended to give the Secretary the power to require even more information when he is not the permit-granting authority. Indeed, in a system that, as one of its central goals, vests "primary governmental responsibility" in the states, it is more reasonable to construe sections 507 and 508 as carefully devised exceptions to the general, commonsense proposition that the decisionmaker is in the best position to decide what information it needs. True, the

Secretary is the federal official who approves state programs, but the power to approve or to reject state programs does not necessarily include the power to specify the criteria of decision. The Act goes into unusually great detail in stating what a permit application must contain.[10] It also states in detail the factors that must be present before the Secretary may approve a proposed program. *See* Act § 503, 30 U.S.C. § 1253. A construction that would allow the Secretary to expand these requirements as he saw fit in effect would permit him, by regulation, to take away the very discretion Congress sought to vest in the states.[11] Like the camel sticking his nose

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[10] The requirement set out in more than a score of paragraphs in sections 507 and 508, 30 U.S.C. §§ 1257 & 1258 (Supp. I 1977), are indeed both extensive and detailed, listing with considerable particularity the necessary contents of each application and reclamation plan. This is not a case in which Congress outlined a scheme, leaving the details of its implementation to the Secretary. Instead, it is a case in which Congress, wanting to commit the substance of its compromise on the surface mining question to law, specified the details itself.

The majority rejects any inference based upon the "mere length or specificity" of sections 507 and 508 on the grounds that the legislative history of section 515, a longer and more detailed section, makes it clear that the Secretary's regulations are expected to "flesh out" the statutory requirements. Majority opinion at 26-27. I believe that the different function served by section 515 makes any comparison irrelevant. That the Secretary's expertise should be of some use in the formulation of environmental protection performance *standards* by no means dictates the conclusion that the Secretary should be able to tell the states what information to require on permit applications. *See* note 5 *supra*.

[11] The Secretary argues that his construction of the Act deserves considerable deference because his Department is the agency Congress has empowered to implement the Act. *See, e.g.*, Whirlpool Corp. v. Marshall, 100 S. Ct. 883, 890 (1980). Despite this general rule, a court always remains free to reach its own conclusion concerning what a particular statute means. *E.g.*, Skidmore v. Swift, 323 U.S. 134, 139-40 (1944). In deciding how much deference to pay an agency's interpretation, a court must look in part

in the tent, the Secretary easily could take over entirely. I will not construe a statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

C.

My conclusion does not mean that the Secretary plays no role in the implementation of sections 507 and 508. On the contrary, under the Act, he must refuse to approve any particular state's proposed program if it ap-

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to "the nature of [the agency's] expertise." Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). In this case, the question of whether the Secretary may issue detailed regulations about what a permit application must contain is "a narrow legal issue that is readily susceptible of judicial resolution." Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 100 S. Ct. 2051, 2062 (1980). Moreover, the fundamental issue in the case before us is whether Congres intended to vest in the Secretary discretion over the contents of permit applications—in other words, whether Congress intended to give him the very discretion on which he now relies. Under these circumstances, I feel free to reach a decision based on my own independent analysis.

For similar reasons, I must reject the Secretary's reliance on the Supreme Court's decision in E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977). In *du Pont*, the Court upheld the authority of the Administrator of the Environmental Protection Agency to set precise, industrywide standards for effluent emissions under § 301 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311 (1976). Those regulations thus concerned the substantive performance standards, which Congress clearly authorized the Administrator to set. The regulations at issue in this appeal, however, do not relate to substantive environmental standards, over which I have assumed the Secretary has complete control, *see* page 8 and note 5 *supra*, but to information that the permit-granting authority requires for the application process. *See* note 10 *supra*. Furthermore, the language of the statute in *du Pont* was far clearer in authorizing the Administrator of EPA to set performance standards than is this Act concerning the Secretary of the Interior's power over application requirements.

pears inadequate to obtain the information sections 507 and 508 require of applicants. The Secretary may issue interpretive rulings, if he so desires, clarifying what he believes individual provisions of these two sections mean. He also is free to recommend that state authorities adopt application requirements more stringent than those spelled out in the Act itself. Finally, if a state fails to abide by its responsibilities under the Act, the Secretary may enforce the Act against particular mines, *see* Act § 521(a)(2), 30 U.S.C. § 1271(a)(2), and, after following certain procedures, assume full authority for issuing and enforcing permits within that state, *see id.* § 521(b), 30 U.S.C. § 1271(b). Until such inadequate enforcement appears, however, the Secretary's actual power to compel compliance with his wishes is limited to approving state programs based on the criteria set forth in the Act, *see id.* § 503, 30 U.S.C. § 1253, and to monitoring success through the federal inspection systems, *see id.* § 517, 30 U.S.C. § 1267.[12]

IV.

Congress intended states to assume the "primary governmental responsibility" for enforcing the Surface Mining Act. To ensure states would live up to this duty, the Secretary of the Interior was given certain supervisory power. We would turn Congress's scheme on its head were we to allow that supervisory authority to consume state discretion and to reduce state power to a purely ministerial implementation of a federally devised program.

I realize, of course, that my construction of the Act is the product of a general view of the distribution of authority Congress was trying to strike. Neither the language of the statute itself nor its legislative history has

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[12] Because I conclude that the regulations at issue violate the Act, I do not reach Peabody's contention that the Act, if it did authorize the regulations, would violate the tenth amendment.

given us a clear path to take. Senate activity concerning these provisions in the last Congress, *see* S. 1403, 96th Cong., 1st Sess., 125 CONG. REC. S12350 (daily ed. Sept. 11, 1979),[13] gives some consolation, however, for I assume that Congress will correct the majority decision if it disagrees or will change the scheme it enacted if it now believes another approach would be more satisfactory.

For the foregoing reasons, I would reverse the judgment of the district court and remand with instructions that the regulations be returned to the Secretary for further consideration in light of these views.

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[13] This bill in part would have deleted the language in § 503 (a) (7) of the Act, 30 U.S.C. § 1253(a) (7), that state laws and regulations must conform with the Secretary's regulations. The bill passed the Senate on September 11, 1979. *See* 125 CONG. REC. S12387 (daily ed. Sept. 11, 1979). It was referred to the House Committee on Interior and Insular Affairs on September 13, 1979.

MACKINNON, *Circuit Judge, dissenting:* My views coincided with the original majority opinion of the Division (Slip op.) in this case and they concur with those now expressed in Judge Tamm's dissent. As I stated previously, to allow the Secretary's overly comprehensive regulations to preempt the authority of the states to act in the first instances, would as a practical matter, operate to stifle the activity of all the states in their handling of what Congress has indicated to be largely local state problems. Congress did not express an intent to so limit the authority of the states. In effect the Secretary's regulations practically smother all state initiative. Thus, to uphold the excessively broad regulations violates the Congressional intent in an unusual way. The Secretary's action in this case is a prime example of the extravagant expansion of federal power by departmental *regulations* that will have the effect of law.

I cannot read the regulations in question as the majority asserts, as being limited to "providing *oversight*, advice, and back-up authority, and the states bearing the majority responsibility for implementation of the Act." Maj. Op. at 3. (emphasis added). If the regulations were so limited I would support them.

The majority states that its "inquiry is narrow," but it expands this narrow jurisdiction into a very far reaching order. As the majority recognizes Congress delegated "*primary* regulatory authority to the States" and "a limited Federal oversight role" was given to the Secretary. Maj. Op. at 12-13. In my view the majority has overly expanded an *oversight* role into a role that permits the Secretary to *formulate* organizational and *operational* rules for the states. This is a great deal more than "oversight." I would restrict the Secretary on initial approvals to the specific confines of the data that Congress specified in the statute.

In my view the cardinal error made by the majority opinion appears on page 8 where it states:

> The Secretary's primary means of guaranteeing effective states programs lies in his *approval function* at the beginning of the process.

Maj. Op. at 11 (emphasis added). There is nothing in the statute, experience or logic to support that statement and it is the keystone the majority relies upon to support its expansion of the Secretary's power. The primary means of guaranteeing effective state programs lies in the *inspection function* which continues as long as mining operations continue. It would be pure folly to rely principally upon the approval at the beginning.

It is thus my opinion that the majority has expanded the Secretary's authority beyond the intent of the statute at the expense of authority that Congress intended to be exercised by the states in the first instance.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

September Term, 1979

Civil Action No. 79-1144

No. 80-1308

IN RE:

PERMANENT SURFACE MINING REGULATION LITIGATION

PEABODY COAL CO.,
Appellant

Before: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, and Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for rehearing and/or suggestion for rehearing *en banc* filed herein by appellee (federal), it is

ORDERED, by the Court, *en banc*, that the above captioned case shall be reheard by the Court sitting *en banc*. The Clerk is directed to schedule this case for oral argument during the September Term, 1980. And it is

FURTHER ORDERED, by the Court, *en banc*, *sua sponte*, that the judgment and opinions entered in this case on July 10, 1980 be, and hereby are, vacated.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge McGowan did not participate in the foregoing order.

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would deny the suggestion for rehearing *en banc*.

APPENDIX C

U.S. COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 80-1308

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, PEABODY COAL COMPANY,
Appellant

July 10, 1980

Before TAMM and MACKINNON, *Circuit Judges*, and HAROLD H. GREENE,* *U.S. District Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* TAMM.

Concurring opinion filed by *Circuit Judge* MACKINNON.

Dissenting opinion filed by *District Judge* GREENE.

TAMM, *Circuit Judge*: In this appeal from a partial final judgment of the United States District Court for the District Court for the District of Columbia [14 ERC 1083]; we must determine whether the Secretary of the Interior may prescribe minimum requirements for coal-mining permit applications that states must adopt before they can assume authority for regulating coal mining within their borders pursuant to the Surface Mining Control and Reclamation Act of 1977 (Surface Mining Act or Act), 30 U.S.C. §§ 1201-1328 (Supp. I 1977). We conclude that the Secretary lacks the power to demand that states require applicants to provide more information than that specified in sections 507 and 508 of the Act, 30 U.S.C. §§ 1257-1258. Therefore, we reverse the judgment of the district court and remand the case with instructions to remand the regulations at issue to the Secretary.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

I.

Congress adopted the Surface Mining Act in an effort to balance the need for coal in satisfying the nation's energy requirements against the environmental dangers posed by mining operations. *See* Act § 102, 30 U.S.C. § 1202. Congress also concluded that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . . ." *Id.* § 101(f), 30 U.S.C. § 1201(f). Congress carefully devised a statutory scheme that would take all these concerns into account. As we recently noted:

> The Act provides a truly federalist distribution of regulatory authority for the coal-mining industry. After a transition period of direct regulation under the Secretary of the Interior, each state in which coal is mined has the option of submitting to the Secretary its own program for supervising mining and reclamation within its borders. Act § 503, 30 U.S.C. § 1253. The Secretary, after following certain procedures, must approve the program if he finds it adequate to protect environmental concerns that lay behind the adoption of the Act. Once its plan is approved, the state assumes responsibility for enforcing the Act. *Id.* If a state fails to submit a satisfactory program, or if it does not wish to assume jurisdiction over mining within its borders, the Secretary must devise a program for that state suited to its particular needs. *Id.* § 504(a), 30 U.S.C. § 1254(a). Whether regulation is in federal or state hands, a firm wishing to engage in surface mining must obtain a permit from the regulatory authority before it may begin or continue its operations. *Id.* § 506(a), 30 U.S.C. § 1256(a). The Act

spells out in detail the minimum information that an applicant must submit to the regulatory authority to accompany its permit request. *See id.* § 507(b), 30 U.S.C. § 1257(b).

In re Permanent Surface Mining Regulation Litigation, Nos. 79-2073 & 79-2116, slip op. at 3 [14 ERC 1012] (D.C. Cir. Jan. 18, 1980) (per curiam) (appeal from denial of preliminary injunction).

In March of 1979, the Secretary issued permanent regulations under the Act. *See* 44 Fed. Reg. 14902, 15312-463 (1979) (codified at 30 C.F.R. pts. 700-890 (1979)).[1] Among these rules are specifications for the minimum information that a state must require in a permit application before the Secretary will approve the state's program and allow it to assume control of mining within its borders. *See* 30 C.F.R. pts. 778-784. These requirements are much more detailed than the information the Act itself prescribes for applicants to submit to the appropriate regulatory authority. *Compare id. with* Act §§ 507-508, 30 U.S.C. §§ 1257-1258.[2]

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[1] Many of the parties to the present litigation in the district court also challenged the Secretary's interim regulations promulgated under §§ 501-502 of the Act, 30 U.S.C. §§ 1251-1252. *See In re Surface Mining Regulation Litigation*, Nos. 78-2190, 78-2191, & 78-2192 [14 ERC 1421] (D.C. Cir. May 2, 1980), *aff'g in part, rev'g in part, and remanding* 452 F.Supp. 327, 456 F.Supp. 1301 [11 ERC 1593, 2078] (D.D.C. 1978).

[2] Numerous provisions of the regulations go far beyond the language of §§ 507 and 508. For example, the rules specify that maps filed with a permit application must identify the uses of existing buildings and the location of roads, cemeteries and Indian burial grounds, park trails, and areas listed or eligible for listing in the National Register of Historic Places. 30 C.F.R. §§ 779.24(d), (h)-(k), 783.24(d), (h)-(k). The Act does not require submission of this information. *See* Act § 507(b)(13), 30 U.S.C. § 1257(b)(13). Under the regulations, the applicant also must list all other permits needed to conduct the proposed mining activities

Various mining states, firms, and trade associations filed a total of nine actions in the United States District Court for the District of Columbia challenging most aspects of the Secretary's permanent regulations, including the information requirements. The district court consolidated these cases and divided the issues involved into two groups, one involving statutory and other general questions and the other involving disputes on the record. The court then refused to enter a preliminary injunction against enforcement of the permit application rules. On appeal, this court affirmed the denial of interim relief as being within the district judge's discretion. *In re Permanent Surface Mining Regulation Litigation*, Nos. 79-2073 & 79-2116 (D.C. Cir. Jan. 18, 1980) (per curiam), *aff'g* Civ. No. 79-1144 (D.D.C. Aug. 21, 1979) (order denying preliminary injunction). In the process, we stated that we were intimating no view on the merits of those appellants' claims. *Id.*, slip op. at 5.

Since our January opinion, the district court has reached its decision on the first group of issues. As part of its opinion, the district court concluded that "the structure of the Act, the general grants of rulemaking authority, and Section 501(b) support the Secretary's power" to promulgate minimum requirements for permit

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and include in the list the name and address of the regulating authority, permit identification numbers, and the present status of these other permit applications. 30 C.F.R. §§ 778.19, 782.19. The applicant must describe existing structures and provide maps identifying the location of various buildings, facilities, and operational areas to be used in mining activities. *Id.* §§ 780.14, 784.14. The applicant's reclamation plan must describe stream diversions, impacts on parks and historic places, road relocations, disposal of excess wastes, and transportation facilities. *Id.* §§ 780.29-.38, 784.17-.19, .22. The Act has no comparable provisions for any of the foregoing requirements, either. *See* Act §§ 507-508. Likewise, the regulations specify in great detail what the blasting plan required under § 507(g), 30 U.S.C. § 1257(g), must include. 30 C.F.R. §§ 780.13, 784.13.

applications under state programs that exceed the information required under the Act. *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, at 31 (D.D.C. Feb. 26, 1980) (memorandum and order) [hereinafter cited as District Court Opinion].[3] *See generally id.* at 30-33. On the motion of Peabody Coal Company, the district court found no just reason to delay entering judgment on this issue and, on March 17, entered a final judgment on the validity of these rules. *See generally* FED. R. CIV. P. 54(b). Peabody, a party to the earlier appeal regarding the preliminary injunction, filed this appeal. To ensure a prompt disposition of the significant question presented, this court granted expedited consideration before this division of the court, which heard the appeal concerning preliminary relief.

II.

A.

We begin our effort to construe the Secretary's powers under the Surface Mining Act by examining the language of the Act itself. *See, e.g., Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Zerilli* v. *Evening News Association*, No. 79-1298, slip op. at 6 (D.C. Cir. June 11, 1980). The Secretary relies primarily on two provisions to demonstrate that Congress granted him authority to issue minimum standards for state permit applications. We do not believe these sections are so clear as the Secretary contends.

The first of the two provisions, section 201(c)(2), authorizes the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act . . . ." 30 U.S.C. § 1211(c)(2). The Secretary asserts that this clause is a

[3] For the text of § 501(b), 30 U.S.C. § 1251(b), see page 7 *infra*.

grant of general rulemaking power that enables him to impose additional information requirements for permit applications. We have two problems with this analysis. First, section 201(c)(2) itself states that the regulations must "be necessary to carry out the purposes and provisions of this Act . . . ." This language still begs the question of whether prescribing additional information requirements for states to demand in permit applications is consistent with the Act. We thus are left precisely where we began. Second, we are not satisfied with either party's invocation of the long-standing canon of statutory construction that an act's provisions should be read so as to render none superfluous. *See generally* 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. C. Sands 1973). Peabody initially argued that reading section 201(c)(2) as a grant of general rulemaking authority makes the twenty specific grants in the Act meaningless. The district court turned this proposition around to hold that reading section 201(c)(2) otherwise makes it superfluous. *See* District Court Opinion at 32. In short, any broad reading of the Act's rulemaking provisions will make section 201(c)(2) redundant of the specific grants or vice versa. We cannot base our decision on a method of statutory construction that, when applied to this act, is so hopelessly circular. *Cf. American Radio Relay League, Inc.* v. *FCC*, No. 78-1853, slip op. at 7 (D.C. Cir. Feb. 22, 1980) (courts will not give independent meaning to a word that, in context, appears to be simply surplusage).

Section 501(b) of the Act gives us more pause. It empowers the Secretary to "promulgate and publish . . . regulations . . . establishing procedures and *requirements* for preparation, submission, and *approval* of State programs . . . ." 30 U.S.C. § 1251(b) (emphasis added). This language can be read to allow regulations detailing minimum standards that all state programs must meet to receive the Secretary's approval. Equally plausible,

however, is a construction that allows these requirements to pertain only to areas in which the Act otherwise allows the Secretary to set nationwide performance standards for states to enforce. *See* Act §§ 515-516, 30 U.S.C. §§ 1265-1266.[4] Alternatively, section 501(b) could pertain only to nonsubstantive requirements for processing state programs through the Secretary's office. In any event, the language of the statute "is hardly free from ambiguity, and there is no clear literal meaning that we are bound to give effect." *United States* v. *Davis*, No. 78-2246, slip op. at 8 (D.C. Cir. Oct. 26, 1979).[5]

B.

We next turn to the Act's legislative history in the hope that it will shed some light on the statute's words. Unfortunately, this, too, is a blind alley. The Senate report, the House report, the conference report, and the

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[4] Peabody, in its initial brief filed in conjunction with the appeal of the denial of preliminary relief, conceded that the Secretary may issue regulations establishing nationwide performance standards under §§ 515 and 516 of the Act, 30 U.S.C. §§ 1265-1266. *See In re* Permanent Surface Mining Regulation Litigation, Nos. 79-2073 & 79-2116, Joint Brief of Appellants at 7, 19. We assume, but do not decide, that this construction is correct.

[5] The Secretary relies less heavily on two other provisions of the Act. The first is the requirement that states demonstrate they have "the capability of carrying out the provisions of this Act and meeting its purposes through . . . (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act." Act § 503(a), 30 U.S.C. § 1253(a). The second defines "State program" as meaning "a program established by a State pursuant to section 503 . . . in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act . . . ." *Id.* § 701(25), 30 U.S.C. § 1291(25). These clauses have the same problem of circularity we found with § 201(c)(2), as discussed in the text: the state must conform only to those regulations that are consistent with the Act, so we still must decide whether these particular regulations conform to the Act's purposes.

floor debate are all silent on whether the Secretary may add application specifications beyond those enacted in sections 507 and 508.

The Secretary at one point refers us to the House report's discussion of section 501(b). This passage states, in full: "Subsection (b) gives the Secretary up to 1 year to promulgate regulations to implement the full regulatory program including technical requirements, permits process[es], and procedures for submission of State programs." H.R. REP. NO. 95-218, 95th Cong., 1st Sess. 62 (1977), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 601. Once again, we do not believe this language is clear at all. The single sentence appears in a short summary of section 501 and simply describes section 501(b) as giving the Secretary rulemaking power for the "full regulatory program," then lists specific examples. It does not purport to define what the "full regulatory program" and its limits are. To determine what the Secretary may do in relation to "technical requirements, permit process[es], and procedures for submission of State programs," as well as other areas, one still must turn to the substantive provisions of the Act that allocate authority between the Secretary and state regulatory agencies. The Secretary, the parties agree, is empowered to establish technical performance standards.[6] Likewise, he clearly has full control over the permitting process in two instances: mining on federal land, *see* Act § 523, 30 U.S.C. § 1273, and mining in states that do not submit satisfactory regulatory programs, *see id.* § 504, 30 U.S.C. § 1254. We still must decide how much further has authority over the permitting process extends—in particular, how control over permitting is allocated between the Secretary and the state regulatory authority when the state wishes to assume responsibility for mining within its borders.

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[6] *See* note 4 *supra*.

III.

With no clear meaning arising from the language of the Act itself or Congress's discussion of it, we must look more broadly at the Act's purposes and structure to decide which approach is more faithful to Congress's overall design. *See, e.g., United States* v. *Bornstein*, 423 U.S. 303, 310 (1976). Our examination indicates that Congress intended to vest in the states primary regulatory and decisionmaking authority and to place the Secretary in an oversight role to ensure that the states provide some minimal level of regulation and control. From there, we conclude that the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to determining whether the states have satisfied that minimum. With this understanding, we hold that the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out.

A.

Congress listed among the purposes of the Act a desire to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations . . . ." Act § 102(a), 30 U.S.C. § 1202(a). It nonetheless found that due to variations in local conditions, "primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States . . . ." *Id.* § 101(f), 30 U.S.C. § 1201(f). The federal government, of course, "*assist*[*s*] the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements *of the Act*, and at the same time, reflect local requirements and local environmental and agricultural conditions . . . ." *Id.* § 201(c)(9), 30 U.S.C. § 1211(c)(9) (emphasis added). *Accord*,

id. § 102(g), 30 U.S.C. § 1202(g). The overall structure thus is one in which the Act will "be enforced by the State[s] with backup authority in the Department of the Interior." H.R. REP. No. 95-218, *supra* at 57, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 595. *See id.* at 129 ("primary regulatory authority" delegated to states with "a limited Federal oversight role" in the enforcement program), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 661.

The Act's allocation of authority reflects these aims. Under an approved state program, the local regulatory authority decides whether to issue permits for coal mining. Act § 510, 30 U.S.C. § 1260. The state authority must operate within certain boundaries prescribed by the Act, and its determination whether to grant a permit request is reviewable in state courts, *id.* § 526(e), 30 U.S.C. § 1276(e), but the Secretary is not involved in this process.[7] Only if the state authorities subsequently fail to enforce their local program may the Secretary assume control of mining within that state, and he may do so then only after following certain procedures in which the state participates. *Id.* § 521(b), 30 U.S.C. § 1271(b). This scheme leaves broad discretion in state officials while ensuring, through federal oversight, that the minimum requirements of the Act are achieved.[8]

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[7] While the bill that became the Surface Mining Act was pending, Secretary of the Interior Cecil K. Andrus wrote to Representative Morris K. Udall, chairman of the House committee considering the bill, and asked in part that his Department be given authority to intervene in the permit process. *See* H.R. REP. No. 95-218, 95th Cong., 1st Sess. 156 (1977) (letter from Sec'y Andrus to Rep. Udall), *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 593, 687. Congress apparently rejected this request.

[8] The Secretary insists that he has left this discretion intact through the so-called "state window" provision in the regulations. This section allows states to propose alternatives that are "consistent with the regulations" the Secretary has issue. 30 C.F.R. § 731.13(c)(1). The language of this provision, however, is decep-

B.

Ordinarily, logic dictates that the entity vested with the power to make a given decision implicitly is left with the power to determine what information it needs to make that decision. In the case of state regulatory authorities, however, Congress wished to make sure that the permit-granting entities would have adequate information:

> Experience has shown that without a through and comprehensive data base presented with the permit application, and absent analysis and review by both the agency and by other affected parties based upon adequate data, [this] judgment has often traditionally reflected the economic interest in expanding a State's mining industry. Valid environmental factors tend to receive short shrift. To meet this problem *the bill delineates in detail the type of information required in permit applications* in sections 507 and 508 *and the criteria for assessing the merits of the application* in section 510.

H.R. REP. No. 95-218, *supra* at 91, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS at 627 (emphasis added). These informational specifications are the "minimum uniform requirements" that all states must demand of permit applicants. S. REP. No. 95-128, 95th Cong., 1st Sess. 53 (1977).

That Congress chose to mandate a minimum amount of information in permit applications does not mean that

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tively comforting. Elsewhere, the regulations define "consistent with" as meaning "no less stringent than and meet[ing] the applicable provisions of the regulations" the Secretary has issued. *Id.* § 730.5(b). Thus, there is little room for states to maneuver. The "window" would be more accurately described as a one-way mirror.

it intended to give the Secretary the power to require even more information when he is not the permit-granting authority. Indeed, in a system that, as one of its central goals, vests "primary governmental responsibility" in the states, it is more reasonable to construe sections 507 and 508 as carefully devised exceptions to the general, commonsense proposition that the decisionmaker is in the best position to decide what information it needs. True, the Secretary is the federal official who approves state programs, but the power to approve or to reject state programs does not necessarily include the power to specify the criteria of decision. The Act goes into unusually great detail in stating what a permit application must contain. It also states in detail the factors that must be present before the Secretary may approve a proposed program. *See* Act § 503, 30 U.S.C. § 1253. A construction that would allow the Secretary to expand these requirements as he saw fit in effect would permit him, by regulation, to take away the very discretion Congress sought to vest in the states.[9] Like the camel stick-

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[9] The Secretary argues that his construction of the Act deserves considerable deference because his Department is the agency Congress has empowered to implement the Act. *See, e.g., Whirlpool Corp.* v. *Marshall*, 100 S. Ct. 883, 890 (1980). Despite this general rule, a court always remains free to reach its own conclusion concerning what a particular statute means, *E. g., Skidmore* v. *Swift*, 323 U.S. 134, 139-40 (1944). In deciding how much deference to pay an agency's interpretation, a court must look in part to "the nature of [the agency's] expertise." *Batterton* v. *Francis*, 432 U.S. 416, 425, n.9 (1977). In this case, the question of whether the Secretary may issue detailed regulations about what a permit application must contain is "a narrow legal issue that is readily susceptible of judicial resolution." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 48 U.S.L.W. 4658, 4662 (U.S. June 10, 1980). Moreover, the fundamental issue in the case before us is whether Congress intended to vest in the Secretary discretion over the contents of permit applications—in other words, whether Congress intended to give him the very discretion on which he now

ing his nose in the tent, the Secretary easily could take over entirely. We will not construe a statute "in a manner which runs counter to the broad goals which Congress intended it to effectuate." *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

C.

Our decision does not mean that the Secretary plays no role in the implementation of sections 507 and 508. On the contrary, under the Act, he must refuse to approve any particular state's proposed program if it appears inadequate to obtain the information sections 507 and 508 require of applicants. The Secretary may issue interpretive rulings, if he so desires, clarifying what he believes individual provisions of these two sections mean. He also is free to recommend that state authorities adopt application requirements more stringent than those spelled out in the Act itself. Finally, if a state fails to abide by its responsibilities under the Act, the Secretary

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relies. Under these circumstances, we feel free to reach a decision based on our own independent analysis.

For similar reasons, we must reject the Secretary's reliance on the Supreme Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 [9 ERC 1753] (1977). In *du Pont*, the Court upheld the authority of the Administrator of the Environmental Protection Agency to set precise, industrywide standards for effluent emissions under § 301 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 3133 (1976). Those regulations thus concerned the substantive performance standards, which Congress clearly authorized the Administrator to set. The regulations at issue in this appeal, however, do not relate to substantive environmental standards, over which we have assumed the Secretary has complete control, *see* pages 7-8 and note 4 *supra*, but to information that the permit-granting authority requires for the application process. Furthermore, the language of the statute in *du Pont* was far clearer in authorizing the Administrator of EPA to set performance standards than is this Act concerning the Secretary of the Interior's power over application requirements.

may enforce the Act against particular mines, *see* Act § 521 (a)(2), 30 U.S.C. § 1271(a)(2), and, after following certain procedures, assume full authority for issuing and enforcing permits within that state, *see id.* § 521(b), 30 U.S.C. § 1271(b). Until such inadequate enforcement appears, however, the Secretary's actual power to compel compliance with his wishes is limited to approving state programs based on the criteria set forth in the Act, *see id.* § 503, 30 U.S.C. § 1253, and to monitoring success through the federal inspection system, *see id.* § 517, 30 U.S.C. § 1267.[10]

IV.

Congress intended states to assume the "primary governmental responsibility" for enforcing the Surface Mining Act. To ensure states would live up to this duty, the Secretary of the Interior was given certain supervisory power. We would turn Congress's scheme on its head were we to allow that supervisory authority to consume state discretion and to reduce state power to a purely ministerial implementation of a federally devised program.

We realize, of course, that our construction of the Act is the product of a general view of the distribution of authority Congress was trying to strike. Neither the language of the statute itself nor its legislative history has given us a clear path to take. Recent Senate activity concerning these provisions, *see* S. 1403, 96th Cong., 1st Sess., 125 CONG. REC. S12350 (daily ed. Sept. 11, 1979),[11] gives us some consolation, however, for we as-

[10] Because we conclude that the regulations at issue violate the Act, we do not reach Peabody's contention that the Act, if it did authorize the regulations, would violate the tenth amendment.

[11] This bill in part would delete the language in § 503(a)(7) of the Act, 30 U.S.C. § 1253(a)(7), that state laws and regulations must conform with the Secretary's regulations. *See* note 3

sume that Congress will correct our decision if it disagrees or will change the scheme it enacted if it now believes another approach would be more satisfactory.

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded with instructions that the regulations be remanded to the Secretary for further consideration in light of this opinion.

It is so ordered.

MACKINNON, *Circuit Judge:* In concurring with Judge Tamm's opinion I am impressed with the fact that to allow the Secretary's overly comprehensive regulations to stand would as a practical matter operate to stifle the activity of all the states in their handling of local problems. The regulations in effect smother practically all local initiative. That was not the intent of Congress. Thus, the Congressional intent is violated in an unusual way.

I am also unconvinced that the time restraints under which the Act must be implemented, presents a valid argument for construing the Act to vest an all encompassing power in the Secretary. Congress may well have acted unreasonably and in an impractical manner in fixing the date for original compliance. This has happened on other occasions. Such mistaken time estimates, however, are not a valid or logical reason for construing an Act, against its terms, just so a quick, albeit shoddy, compliance with legislative intent, can be effectuated.

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supra. The bill passed the Senate on September 11, 1979. *See* 125 CONG. REC. S12387 (daily ed. Sept. 11, 1979). No action has been taken in the House.

HAROLD H. GREENE, *District Judge*, dissenting: Like the majority, I believe that the language of the Surface Mining Act and its legislative history are not without ambiguity,[1] and for that reason I agree with much of the court's analysis. However, in my view the broad purposes of the statute would most faithfully be effectuated by a construction which upholds the authority of the Secretary to issue minimum information regulations.

I

The Surface Mining Act was enacted in the Fall of 1977 for the primary purpose of establishing a "nationwide program to protect society and the environment from the adverse effects of coal mining operations." Section 102(a). The Congress was "mindful of past failures on the state level" (H.R. Rep. 95-281, 95th Cong., 1st Sess., p. 85) and the fact that, "[w]hile a number of States do have surface mining reclamation programs, regulation of surface coal mining is not uniform, and in many instances is inadequate" or not fully enforced. S. Rep. No. 95-128, 95th Cong., 1st Sess., pp. 49-51.

In order to deal with this problem a "national system" was being created, to include administrative, environmental, and enforcement standards for regulatory programs to be administered by the states. House Report p. 57. Such a system was deemed essential if the environmental purposes of the law were to be achieved instead of being thwarted through economic competition among the states by means of the adoption of low environmental standards. Section 101(g); *Union Carbide Corp.* v. *Andrus*, —— F.Supp. ——, 13 ERC 1481, 1492-96 (S.D. W.Va. 1979). The legislators expected "that Federal regulations promulgated under the Act will fully implement the environmental performance standards." House Report p. 85.

[1] Nevertheless, again like the majority, I think they are of some assistance to us.

Members of the Senate who were opposed to the bill which became the Surface Mining Act expressed concern about the concept of federal regulatory oversight over state programs. They argued [2] that

> [a]s the bill is written a state will either have to choose to have a 'Federal' program regulating all surface mining within a state, or a 'State' program which is drafted pursuant to the rules and regulations promulgated by the Secretary of Interior. State participation in this regulatory process is illusory since the state would not have the flexibility to influence the substance.

Some of the members of the Senate Committee on Energy and Natural Resources proposed a third option: adoption by the states of the reclamation standards, the "core provisions" of the bill, subject to federal monitoring of the effectiveness of state enforcement. An amendment embodying that option did not pass,[3] and it is not unreasonable to interpret this congressional rejection of the minority proposals as some evidence that the Congress supported the concept of state programs conforming to rules and regulations issued by the Department of the Interior. The construction adopted by the court seems to me to be inconsistent with the overall policy approach embodied in the legislation and to go a considerable distance toward adopting the alternative Congress rejected.

II

Two types of statutory provisions enable the Department of the Interior to carry out these general purposes—the Secretary's general rulemaking powers and the more specific authority granted to him in Title V of the Act.

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[2] Senate Report, pp. 125-126 (minority views).

[3] *Id.*

Section 201(c)(2) grants to the Secretary rulemaking authority of a familiar kind. That provision authorizes him to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act."

The Supreme Court and this court have consistently held that similar grants of general rulemaking authority sustain the validity of detailed regulations which are reasonably related to the purposes of the enabling legislation. Thus, in *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132 (1977), the Court upheld the authority of the Environmental Protection Agency to issue industry-wide regulations under the Federal Water Pollution Act, 33 U.S.C. § 1251 *et seq.*, in significant part because the statute granted to the agency the general authority to "make such regulations as are necessary to carry out its functions" and charged it with "the duty of administering the Act."[4] See also, *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796 (1978); *Kyle* v. *ICC*, —— U.S.App. D.C. ——, 609 F.2d 540, 543 (1979).

This principle is especially relevant where, as here, a remedial statute is involved which must, if possible, be given a construction which will effectuate its purpose,[5]

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[4] The general statutory provisions here parallel with respect to Interior's information-gathering function those which in *du Pont* were held to be sufficient to sustain EPA regulations relating to the even more vital substantive performance standards area. Reliance upon section 201(c)(2) of the Surface Mining Act as authority for comprehensive regulations would not appear to involve greater elements of circularity than reliance upon similar statutory provisions in *du Pont* and other cases to sustain other regulatory programs.

[5] *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491 (1960); *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968), *National Petroleum Refiners Association* v. *FTC*, 157 U.S.App.D.C. 83, 482 F.2d 672, 689-91 (1973), *cert. denied*, 415 U.S. 951 (1974).

and where, again as here, the law involves an agency charged with national responsibilities affecting an entire industry.[6]

These general rules are not vitiated by the circumstances that, following the valid adoption of the regulatory program, implementation is left to the states. Certainly, the Secretary would have no power to promulgate regulations which would interfere with state administration at the implementation stage. But during the pre-approval period, in which the Secretary clearly was intended to play a significant role, his general rulemaking authority supports regulatory implementation just as it normally does in federal regulatory situations. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

III

The heart of the Surface Mining Act is Title V. The principal means chosen by Congress for achieving the statute's environmental purposes is a permit system established by section 506. That system, in turn, depends for its vitality upon adequate information in the permit applications (sections 507 and 508) which must be submitted in a manner satisfactory to the states. But the states are by no means the exclusive guardians of this process.

Section 503 requires any state desirous of undertaking its own regulatory program to submit to the Secretary a plan demonstrating that it has the capability of carrying out the provisions and meeting the purposes of chapter V. The state proves such a capability by meeting a variety of substantive standards and by adopting "rules and regulations consistent with regulations issued by the

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[6] *E. I. du Pont de Nemours, supra*, 430 U.S. at 132-35; *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 277-81 (1969); *Permian Basin Area Rate Cases, supra*, 390 U.S. at 776; *National Petroleum Refiners Association* v. *FTC, supra*, 482 F.2d at 688-89.

Secretary pursuant to this Act." Section 503(a)(7). If the Secretary does not approve a state's program under this standard, the state may resubmit its program within sixty days, but should it ultimately fail to submit a valid program, an exclusively federal program is adopted and implemented.

The Secretary's broad mandate to pass upon and to approve or disapprove state programs supports, without more, an inference that he also possesses the power to prescribe, through regulation, what kind of programs will meet his approval. But the statute does not leave the existence of this authority solely to inference. Section 501(b) explicitly and without any exception[7] grants to the Secretary the power to establish "procedures and requirements for preparation, submission, and approval of State programs."

By their very terms, the regulations here at issue establish "requirements for preparation . . . of State programs" as provided for in section 501(b). That language seems to me to contradict the majority's reading of the statute which apparently (see note 9 *infra*) confines the Secretary's function to the limited task of guaranteeing literal consistency with the Act's performance standards.

State regulations which are inconsistent with the very terms of the statute would be invalid in any event, with or without federal regulatory intervention. By restricting the Secretary to guaranteeing textual compliance with the statute, the court's decision thus effectively eliminates the federal authorities from any significant role in the administration of the permit application pro-

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[7] Nothing in the language of this provision or its legislative history limits the Secretary to the imposition of requirements for processing state programs or to areas other than those involved here. See majority opinion, pp. 7-8. [14 ERC 1816]

gram. Such a narrow construction is quite unusual,[8] and there is no reason in the statutory purposes or the language of the Act so to restrict the Department of the Interior in this instance.

The Secretary's approach—to adopt regulations and thereby to advise the states in advance what programs he regards as meeting the statutory standard—may not be[9] conceptually that different from methodology acceptable to the court and to appellants. Appellants have conceded the Secretary's power to disapprove state programs even in the permit application area and to return them for revision until they are satisfactory. Similarly, the court suggests that the Secretary has the authority to refuse to approve a state's particular program if it appears inadequate to obtain the information required by sections 507 and 508 and that he may issue interpretive rulings. At the same time, the court rejects the regulations the Secretary has issued here. I believe that, especially in view of the time constraints under which the Act must be implemented,[10] the Secretary's approach

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[8] *United Airlines* v. *CAB*, 186 U.S.App.D.C. 401, 569 F.2d 640, 648 (1977); Mourning v. Family Publications Service, Inc., *supra*, 411 U.S. at 472-74.

[9] The court does not make it entirely clear whether in exercising these responsibilities, the Secretary is restricted to a comparison of the state regulations with the statutory language or whether he may place a gloss upon that language by issuing interpretive regulations of his own.

[10] Under section 503(a) the state programs were to have been submitted to the Secretary by February 3, 1979. The Secretary, acting pursuant to section 504(a), extended that deadline to August 3, 1979, and the district court granted a further extension to March 3, 1980. Two state programs have been approved (Texas, 45 Fed. Reg. 12998, February 27, 1980; Montana, 45 Fed. Reg. 21560, April 1, 1980); and two others, after an initial partial disapproval (Mississippi, 45 Fed. Reg. 19268, March 25, 1980; Wyoming, 45 Fed. Reg. 20930, March 31, 1980) are being resubmitted. Twenty other state program submissions are currently un-

constitutes a reasonable, indeed the only reasonable means of practical implementation.[11]

To have proceeded by a method of receiving state plans and programs, returning them to the states for redrafting in conformity with—presumably inarticulated—standards, then passing upon them again and again until they were found to be satisfactory would have been an invitation either to chaos or to a paralysis of the regulatory process. Instead, the Secretary's regulations advise the states what state programs would be acceptable, and they further elaborate that in promulgating these programs the states will be free to make use of the "state window" provisions of the regulations[12] to take account of local conditions. I believe that this method of proceeding was logical, fully consistent with the statute, and lawful. *National Petroleum Refiners Association* v.

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der review by the Secretary. It is difficult to visualize how these states and the federal authorities are to proceed hereafter to implement the Act under the court's directive.

[11] The law favors those constructions of agency rule-making powers which render the statutory purposes easiest to effect. *United States* v. *Chrysler Corp.*, —— U.S.App.D.C. ——, 591 F.2d 958, 961 (1979); *American Horse Protection Association* v. *Department of the Interior*, 179 U.S.App.D.C. 246, 551 F.2d 432, 439-40 [10 ERC 1043] (1977).

[12] Deviations from the regulations are not only allowed in theory through "state window" provisions in the regulations, 30 C.F.R. § 731.13, but they have been permitted in practice; *e.g.*, with respect to Montana. The district court still has under consideration the issue of the substantive validity of the Secretary's minimum standards, and those which it ultimately finds to be inconsistent with the requisites of the statute will presumably be struck down. Thus, any concern regarding the imposition of unduly rigid standards leaving too little scope for state experimentation in violation of the statute seems to be premature.

FTC, supra, 428 F.2d at 683-84; *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653 (1973).[13]

IV

Both appellants and the court rely to an extent on legislative developments occurring in 1979, two years after enactment of the Surface Mining Act. In this regard, appellants suggest that the interpretation they propose is supported by passage by the Senate of a bill (S. 1403) which would delete the requirement for conformity of state programs to regulations issued by the Secretary of the Interior.[14]

It is, of course, well established that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963). That hazard is compounded where, as here, the views are those of only one house of Congress. *Allyn* v. *United States*, 461 F.2d 810, 811 (Ct. Cl. 1972).[15] Be-

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[13] The majority assumes (p. 15, n.10) that a contrary conclusion may raise a Tenth Amendment problem. If the Congress has the authority under the Commerce Clause to prohibit roadside restaurants from discriminating *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)) and to regulate the production of wheat which a farmer will consume himself (*Wickard* v. *Filburn*, 317 U.S. 111 (1942)), it surely has power, notwithstanding the Tenth Amendment, to regulate surface coal mining with its enormous nationwide impact.

[14] The bill would delete portions of sections 503(a)(7) and 701(25) upon which the Secretary's exercise of authority is based at least in part, and the Committee made clear that the purpose of the amendment was to eliminate the requirement that state regulations be consistent with the regulations issued by the Secretary. S. Rep. No. 96-271, 96th Cong., 1st Sess. 4 (1979).

[15] The House of Representatives has not passed any legislation comparable to S. 1403.

yond that, passage by the Senate of S. 1403 is at least as consistent with the proposition that that body assumes existing authority in the Secretary to adopt the regulations here at issue as it is with the inference proposed by appellants.

Senator Jackson, chairman of the Senate Committee on Energy and Natural Resources and six of his colleagues have stated [16] that they regard the amendment as "a substantial undermining of the intent of Congress in passing the Surface Mining Act." In their opinion, the rules and regulations issued by the Secretary constitute a proper interpretation of the congressional intent, and they regard the elimination of these regulations from the review process as a subversion of the orderly procedure for approval or disapproval of state program submissions.[17] Congressman Udall, principal sponsor of the House bill which became the Surface Mining Act, likewise expressed his opposition to an amendment similar to S. 1403, and it may be that his opposition was responsible for lack of action in the House of Representatives.

The short of it is that the Congress has enacted no new legislation and, having been unsuccessful in the legislative arena, the appellants are attempting to achieve the objective of defeating the basic scheme of the Act through litigation. In my opinion they have not demonstrated that the district court erred in finding that the statute authorized the issuance of the Secretary's regulations.

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[16] S. Rep. No. 96-271, pp. 32-33 (minority views).

[17] The minority report lists a large number of subjects which under the amendment would be separately interpreted by state governments, with a negative effect on a minimal level of comparability between state programs and the law. In the view of those subscribing to the report, "the very likely outcome of such a procedure will be considerable increase in litigation [and] ultimately a new set of rules and regulations will be written by the courts." S. Rep. No. 96-271, pp. 33-34.

The court relies on last year's legislative development only to the extent of indicating that, should its construction of the law be in error, the Congress could effect any necessary correction. That factual premise may well be unsound since the House and Senate appear to be in deadlock. Beyond that, I do not believe that we would be justified in resting our decision in a case or controversy before us, either in whole or in part, upon the expectation that Congress might rectify any error. This is so particularly where, as in this instance, the Congress could, with equal ease or difficulty, overrule whatever construction we adopt. Thus the possibility of congressional action does not assist us, one way or the other, in resolving the issues.

For the reasons stated, I believe that the Secretary of the Interior acted within the scope of his authority and that the district court correctly interpreted the law, and I respectfully dissent.

APPENDIX D

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE PERMANENT SURFACE MINING REGULATION LITIGATION, Civil Action No. 79-1144 (Consolidated)

February 26, 1980

MEMORANDUM

This complex case finds its nascency in the Surface Mining Control and Reclamation Act of 1977 ("The Act; SMCRA"). The Act required the Secretary of Interior to develop first interim and later permanent regulations to govern the surface mining of coal in the United States. The interim regulatory program became effective in early 1978. *In Re Surface Mining Regulation Litigation*, 452 F.Supp. 327, 331 [11 ERC 1593] (D.C. 1978). The Secretary released the final regulations on March 13, 1979. Presently before the court are summary judgment motions challenging aspects of the permanent regulations.

The Act provides that challenges to the Secretary's regulations must be filed within 60 days of their release in the United States District Court for the District of Columbia. Section 526(a)(1) of the Act, 30 U.S.C. § 1276(a)(1). Various plaintiffs filed nine complaints challenging the Secretary's permanent regulatory program. The court consolidated the actions.

Recognizing that the consolidated action raises approximately 100 challenges to the Secretary's regulations, the court instituted a split summary judgment briefing schedule. This opinion[1] addresses issues raised at the

[1] The court previously ruled on the plaintiffs' motion for preliminary relief. The court granted the motions filed by the State of Illinois and Commonwealth of Virginia to enjoin enforcement of

November 16, 1979 hearing and in the first round briefs. A subsequent opinion will address issues raised in the second round briefs and at the January 18, 1980 hearing.

The six plaintiffs' briefs[2] submitted in this round challenge the power of the Secretary to promulate regulations under the SMCRA. They also challenge approximately 50 regulations. This opinion upholds the broad power of the Secretary to issue regulations pursuant to the Act. The court does, however, remand various regulations for arbitrariness, capriciousness, or inconsistency with law.

Standard of Review

The standard of review incumbent upon this court is not in dispute. Section 526(a)(1) of the Act, 30 U.S.C. § 1276, enunciates the standard. It expressly provides that "[a]ny action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law." This standard is highly deferential and generally presumes the validity of the agency action. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 34 [8 ERC 1785] (D.C. Cir.), *cert. denied*, 426 U.S. 941 [8 ERC 2200] (1976).

Despite this deference, the court must avoid rubber stamping the agency's regulations. *Id.* Instead, the court should search for, and find, a rational basis before upholding the agency's actions. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974); *Ethyl Corp., supra*, 541 F.2d at 28.

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the August 3, 1979 deadline for submission of state programs. The industry motions for preliminary relief were denied. Memorandum Opinion, August 21, 1979.

[2] Briefs were submitted by: 1) the National Wildlife Federation; 2) the Pennsylvania Coal Mining Association; 3) the National Coal Association; 4) Peabody Coal Company; 5) the State of Illinois; and 6) the Commonwealth of Virginia.

I. STATE PROGRAM

The states play a major role in the implementation of the Surface Mining Control and Reclamation Act. Section 503(a) of the Act, 30 U.S.C. § 1253(a), permits each state to assume exclusive jurisdiction over surface coal mining regulation. To achieve jurisdictional control, a state must submit a regulatory program to the Secretary of Interior ("the Secretary"), and, further, receive approval of the program within six months of its submission. Section 503(b) of the Act, 30 U.S.C. § 1253(b). If a state fails to submit a program, or the state program is disapproved, then the federal regulations govern surface coal mining operations for the state.[3] Section 504(a) of the Act, 30 U.S.C. § 1254.

A. *Secretary's Power to Establish Regulations*

Approval of a state program depends, inter alia, upon the states' demonstration that its program is no less stringent than the requirements set forth in the Act and in the Secretary's regulations. The stringency requirement emanates from 30 C.F.R. § 730.5, 44 Fed. Reg. 15324 (1979). This regulation makes clear that the terms "consistent with" and "in accordance with" mean:

> (a) With regard to the Act, the State laws and regulations are no less stringent than, meet the minimum requirements of and include all applicable provisions of the Act.
>
> (b) With regard to the Secretary's regulations, the State laws and regulations are no less stringent than and meet the applicable provisions of the regulations of this Chapter.

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[3] Disapproval of a State program does not automatically result in imposition of the federal regulations. The Act allows a State 60 days to resubmit a revised program. Section 503(c) of the Act, 30 U.S.C. § 1253(c).

The consistency requirement of 30 C.F.R. § 730.5 forms the basis for a broad attack on the Secretary's regulations advanced by the State of Illinois, Illinois believes that a state program should not have to meet the substantive requirements of the Secretary's regulations. Instead, according to Illinois, a state program need only demonstrate consistency with the requirements of the Act. Although this attack appears centered upon substantive performance standards,[4] Illinois extends the argument to encompass the entire package of regulations promulgated by the Secretary pursuant to the Act.[5]

Illinois raises several objections to conformity with the Secretary's regulations. These objections boil down to a twofold argument: 1) the Secretary lacks a statutory basis to require state program consistency with the permanent regulations; and 2) therefore, 30 C.F.R. § 730.5, defining consistency as no less stringent than, is arbitrary and inconsistent with the Act.

Contrary to the Illinois argument, the court finds that the Act contains several unequivocal grants of rulemaking authority vested in the Secretary of Interior. Perhaps the most authoritative source for determining whether a state program must meet the requirements of the Secretary's regulations is the statutory definition of a state program. Section 701(25) of the Act, 30 U.S.C. § 1291(25), defines a state program as "in accord with the requirements of this Act *and regulations*

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[4] Illinois brief at 21 (Secretary has arbitrarily extended stringency concept "into performance standard context").

[5] "With respect to the requirements of State Program consistency with the Act itself, adopted in Section 730.5(a), Illinois believes the Secretary has generally correctly concluded that the State programs must meet minimum requirements of the Act. Frankly, it seems to Illinois that that is all that is properly needed to describe what is required of the States to obtain program approval." Illinois brief at 19.

issued by the Secretary pursuant to this Act . . ." (emphasis added) In addition, Section 503(a)(7) of the Act, 30 U.S.C. § 1253(a)(7), requires that a state program demonstrate a capability for carrying out "rules and regulations consistent with regulations issued by the Secretary pursuant to this Act."[6] These statutory sections clearly empower the Secretary to condition approval of a state program upon its consistency with the Secretary's regulations.

Moreover, Section 201(c)(2) of the Act, 30 U.S.C. § 1211(c)(2), provides that "The Secretary, acting through the Office, shall publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act." An agency's regulations may cover items not specifically delineated in a statute so long as the regulations conform to an act's purposes and policies. *Public Service Commission of State of New York* v. *Federal Power Commission*, 327 F.2d 893, 897 (D.C. Cir. 1964); *see Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968); *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953).

Sections 201(c)(2), 503(a)(7), and 701(25) provide ample support for requiring the state regulatory program to meet the substantive and procedural criteria of the

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[6] Illinois notes that Section 504(e) of the Act, 30 U.S.C. § 1254(e), requires a state program to meet the criteria enumerated in Section 503(a)(1)-(6). The failure to include Section 503(a)(7), according to Illinois, evinces Congressional intent that state programs need not be consistent with federal regulatory specifications.

The court recognizes the ambiguity raised by Section 504(e). This ambiguity is easily resolved by resort to the Act's clear definition of a state program. In defining a state program as "in accord with the requirements of this Act and regulations issued by the Secretary," 30 U.S.C. § 1291(25), the Act leaves little room for doubt that a state program must meet the minimum requirements of both the Act and the Secretary's regulations.

Secretary's regulations. Illinois attempts to deflate these statutory grants of rulemaking authority by directing the court's attention to Section 501(b) of the Act, 30 U.S.C. § 1251(b)(1). It argues that Section 501(b) allows the Secretary to establish only procedural regulations with respect to state programs. It is true that this section first refers to a "permanent regulatory procedure." But it goes on to state that the Secretary's regulations should also cover "procedures and requirements for preparation, submission, and approval of State programs." The conjunctive use of the word "and" between these two phrases suggests that Congress intended the Secretary to develop both procedural and substantive regulations governing state program submission and approval.

To the extent the statute is capable of duplicative interpretations regarding consistency with the Secretary's regulations, the legislative history settles this controversy. It clearly dictates the Secretary's rulemaking authority to cover minimum standards for state programs. The House Report states:

> The committee is mindful of the past failures on the State level and thus bases it [sic] approval of H.R. 25 on the expectation that Federal regulations promulgated under the Act willfully implement the environmental performance standards. *Obviously, the mere reproduction of the statutory environmental performance standards in the regulations would be inadequate.* (emphasis in original)

H.R. Rep. No. 94-896, 94th Cong., 2d Sess. 34 (1976). The House unquestionably intended state programs to incorporate, and be consistent with, more than merely the Act's requirements. The full reach of the Secretary's regulatory guidance is enunciated in the House report of the next session. It states that the Secretary may "promulgate regulations covering the full regulatory pro-

gram including technical requirements, permit processor [sic], and procedures for submission of State programs." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 62 (1977). This view is confirmed by the Conference Committee Report:

> An approved State program requires (1) a State law consistent with the Federal law and (2) State rules and regulations consistent with the Secretary's regulations. The Conference Report retains the basic principle that *the federal laws and regulations are minimum standards which may be exceeded by the States.* (emphasis added)

H.R. Rep. No. 95-493, 95th Cong., 1st Sess. 102 (1977). These statements from the legislative history clearly articulate Congressional intent that the Secretary should promulgate regulations that constitute minimum standards for a state program.

B. Regulations Relating to Secretary's Power To Require Consistency

This court's finding that the Secretary's power extends to regulations enacting substantive minimums for state programs also necessitates upholding specific regulations in the state program subchapter. For example, Illinois attacks 30 C.F.R. § 730.5, 44 Fed. Reg. 15324 (1979). This regulation, as explained above, requires that "State laws and regulations are no less stringent than and meet the applicable provisions of the regulations of this Chapter." Illinois claims the definition of "consistent with" is arbitrary and inconsistent with the Act. Its arguments are identical to those addressing the statutory authority of the Secretary to prescribe minimum standards for state programs. This court has resolved that the Act and legislative history support the Secretary's power to prescribe procedural and substantive requirements as a condition toward approval of a state program. 30 C.F.R.

§ 730.5(b) is therefore consistent with the act and rational in its character.

Similarly, 30 C.F.R. § 732.15, 44 Fed. Reg. 15327-28 (1979), explicates the criteria for approval or disapproval of state programs. This regulation subsumes the presumption that state programs must be consistent with federal regulatory standards. Since the Act and the legislative history allow the Secretary to prescribe such criteria, this regulation is valid.

C. Other State Program Regulations

1. Publication of Less Stringent Standards

Illinois attacks the regulatory provision directing the Secretary to publish in the Federal Register those sections of a state regulatory program less stringent than the requirements of the Federal Act and the Secretary's regulations. 30 C.F.R. § 730.11, 44 Fed. Reg. 15324 (1979). Illinois believes this regulation allows the Secretary to invalidate parts of a state program merely by publishing the less stringent sections in the Federal Register. This procedure, according to Illinois, violates the Tenth Amendment; the Secretary may invalidate State law without any rulemaking procedure or adjudicatory hearing.

Illinois misconstrues 30 C.F.R. § 730.11. Rather than constituting the final action in voiding sections of a state program, this regulation implements the first step that triggers due process protections afforded to the states. For example, 30 C.F.R. § 732.12, 44 Fed. Reg. 15326 (1979), provides for notice, comment, and public hearing, before the Director of the OSM may recommend to the Secretary that a program be approved in whole or in part. 30 C.F.R. § 732.13(c), 44 Fed. Reg. 15327 (1979), the final step in the approval process, requires the Secretary to publish his decision in the Federal Register.

Should the Secretary disapprove a state program, the State receives 60 days to submit a revised program. Section 503(c) of the Act, 30 U.S.C. § 1253(c). Hence, 30 C.F.R. § 730.11 is only the first step, in a process encompassing notice, comment, and hearing, that leads to state program approval or disapproval.

2. State Window

Both Illinois and Virginia attack the "state window" provision. 30 C.F.R. § 731.13, 44 Fed. Reg. 15324 (1979). The state window allows states to propose, as part of their regulatory program, alternatives to the standards and procedures adopted by the Secretary. Ordinarily, as explained above, the Secretary's regulations constitute the minimum standards and procedures that a state program must equal or surpass. The state window provision allows deviation from the Secretary's regulations when necessitated by local requirements or local environmental or agricultural conditions.

The salient portion of this regulation provides:

> As part of its program submission or as an amendment to an approved State program, a State may request approval for alternatives to the provisions of the regulations of this Chapter. For each alternative provision the State shall—
>
> > (c) Explain how and submit data . . . demonstrating—
> >
> > (1) that the proposed alternative will be *in accordance with* the applicable provisions of the Act and *consistent with* the regulations of this Chapter and
> >
> > (2) that the proposed alternative is *necessary* because of local requirements or local environmental or agricultural conditions.

30 C.F.R. § 731.13 (emphasis added). Illinois objects to the definitions of "consistent with" and "in accordance with." It repeats the arguments it employed attacking the definitions of these terms at 30 C.F.R. § 730.5. The court considered and rejected these arguments above.

Illinois further argues that the standard "capable of achieving the same regulatory result" is superior to the stringency standard adopted in the regulations. The court believes the Secretary properly rejected this standard. The Secretary stated in the Preamble that as a result standard is unacceptable because "regulatory result is difficult to define. Also there are many minimum requirements . . . that are clearly not results." [7] 44 Fed. Reg. 14952 (1979). Moreover, if Illinois is to prevail in its alternative standard, it must show that the "stringency" test is inconsistent with the Act or arbitrary or capricious. It has failed to make such a demonstration to this court.

Both Virginia and Illinois object to the word "necessary" as found in 30 C.F.R. §731.13(c)(2). 44 Fed. Reg. 15324 (1979). Virginia directs the court's attention to Section 201(c)(9) of the Act, 30 U.S.C. § 1211(c)(9). This statutory provision commands the Secretary to:

> assist the States in the development of State programs . . . which meet the requirements of the Act, and, at the same time, *reflect* local requirements and local environmental and agricultural conditions (emphasis added).

Virginia alleges the word "reflect" directs the Secretary to accept any state alternative insofar as the alternative reflects local conditions. An alternative based on reflection of, rather than necessity of, local conditions

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[7] Procedural matters, such as the public participation, notice, and hearing provisions, provide examples of requirements that fail to qualify as results.

constitutes a lower standard of cause imposed upon the States.

Virginia misperceives both the meaning of "reflect", employed in Section 201(c)(9) of the Act, and the word "necessity", found in 30 C.F.R. § 731.13. The word "reflect" addresses the requirement that only local conditions can justify a deviation from federal substantive requirements. Contrary to Virginia's contention, the word "necessity" fails to contemplate a showing that the state alternative be essential or imperative. Instead, it implies that local conditions should reflect a necessary basis for deviation from the federal standard. Therefore, a state need only demonstrate that: 1) local conditions make it difficult to meet the federal standard; 2) the state alternative relates to local conditions; and 3) the alternative is no less stringent than the federal regulation.

Illinois believes that requiring any showing of local need as a condition for alternatives to the Secretary's regulations is inconsistent with the Act. This objection is without merit. The court has already found that a state program must meet the standards of both the Act and the Secretary's regulations. Moreover, Section 201(c)(9) of the Act intends that state programs reflect local conditions. It is therefore reasonable for the Secretary, and consistent with the Act, to require that deviation from the Secretary's regulations be based on conditions attendant to local need.

3. Citizen Suits

30 C.F.R. § 732.15(b)(10), 44 Fed. Reg. 15327 (1979), requires a state program to provide for "public participation." This regulation, however, fails to elucidate a definition of public participation. Instead, the Secretary discusses the term at 44 Fed. Reg. 14965 (1979). The preamble makes clear that a provision for

citizen suits in state court is a necessary element of public participation.

Section 520 of the Act, 30 U.S.C. § 1270, provides for citizen suits in federal district court. Virginia believes that since Section 520 fails to refer to state court suits, Congress intended that private citizens seek redress only through federal court litigation.

The court finds the Act and the legislative history support the Secretary's command that state programs include a provision for citizen suits in state court. Section 521(d) of the Act, 30 U.S.C. § 1271(d), provides:

> As a condition of approval of any State program submitted . . . the enforcement provisions thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto.

One of these procedural requirements, delineated at Section 520(a) of the Act, concerns private citizen suits.

The legislative history confirms this finding. The Senate Report urges "increased opportunity for citizens' to participate in the enforcement program . . ." S. Rep. No. 95-128, 95th Cong., 1st Sess. 90 (1977). Representative Udall, a primary sponsor of the Act, describes state programs as including "enforcement, administrative and judicial review; public notice and hearing; citizen suits . . ." 123 Cong. Rec. H7585 (daily ed. July 21, 1977). Moreover, Senator Allen, an opponent of the Act, reiterated that "the State Program developed under S.7 would be a completely designed Federal Program in every respect including . . . standing to sue . . ." 123 Cong. Rec. S8024 (daily ed. May 19, 1977).

Finally, upholding the citizen suit provision is consistent with the purposes of the SMCRA. Section 102(i) of the Act, 30 U.S.C. § 1202(i), urges public participation in developing, revising, and enforcing federal and state programs.

4. Citizen Access

30 C.F.R. § 786.27(b)(2), 44 Fed. Reg. 15381, requires that private persons be allowed to accompany inspectors when a private citizen complaint prompted the inspection. The statutory basis for citizen access is found at Section 521(a) of the Act, 30 U.S.C. § 1271(a)(1). This section states, in relevant part:

> When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.

Virginia argues that although Section 521(a) expressly requires citizen access for federal inspections, the Act fails to impose a similar requirement upon the states.

Virginia notes the only reference to state programs in Section 521 (enforcement) appears at subsection 521(d). This subsection requires a state program to "incorporate sanctions no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto." Virginia argues that the word "thereto" refers to "sanctions." According to Virginia, the citizen access provision of Section 521(a) is unrelated to sanctions. Therefore, Section 521(d) fails to provide statutory support for including citizen access in state programs.

The government takes a divergent view of Section 521(d). It argues that the word "thereto" refers to "en-

forcement provision"[8] rather than to "sanction." Because citizen access is one component of Section 521's enforcement provisions, Section 521(d) requires state programs to incorporate citizen access.

The government's argument is persusive. The use of the conjunctive word "and", and in the first sentence of Section 521(d), indicates that both phrases after the word "thereof" refer back to "enforcement provisions". Hence, the enforcement provisions of Section 521 shall: 1) "at a minimum, incorporate sanctions no less stringent than those set forth in this section, and [2] shall contain the same or similar procedural requirements relating thereto." The procedural requirement of citizen access is thus a proper condition for approval of a state program.[9]

5. Point System for Penalties

Section 518 (i) of the Act, 30 U.S.C. § 1268(i), requires that a state program "shall, at a minimum, incorporate penalties no less stringent than those set forth in this section, and shall contain the same or similar procedural requirements relating thereto." Pursuant to this section, the Secretary established a point system for

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[8] The full text of the first sentence of Section 521(d) of the Act, 30 U.S.C. § 127(d), provides:

> As a condition of approval of any State program submitted pursuant to section 503 of this Act, the *enforcement provisions* thereof shall, at a minimum, incorporate sanctions no less stringent than those set forth in this sectio, and shall contain the same or similar procedural requirements relating thereto. (emphasis added)

[9] This analysis is also consistent with the purposes of the Act. Section 102(i) of the Act, 30 U.S.C. § 1202(i), provides that the Act shall "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulation, standards, reclamation plans, or programs established by the Secretary of any State under this Act."

assessing civil penalties. 30 C.F.R. § 845, 44 Fed. Reg. 15461-63 (1979). Two other regulations, 30 C.F.R. § 732.15(b)(7), 44 Fed. Reg. 15327 (1979), and 30 C.F.R. § 840.13(a), 44 Fed. Reg. 15456 (1979), require that a state program be consistent with 30 C.F.R. § 845.

Virginia argues that Section 518(i) of the Act only necessitates a state program to incorporate the penalties and procedures explicated in Section 518. Because Section 518 fails to enumerate a point system for assessing civil penalties, the imposition of this requirement upon the states is inconsistent with the Act.

The Secretary interprets Section 518 to mean that a state program must assess a penalty amounting to no less than that required by the Act and its implementing regulations. It finds support for imposing consistency with the implementing regulations from Section 503(a)(7) of the Act, 30 U.S.C. § 1253(a)(7). This section directs a state program to demonstrate capability of meeting the "rules and regulations issued by the Secretary pursuant to the Act."

The court finds Virginia's arguments persuasive, and will remand 30 C.F.R. §§ 732.15(b)(7) and 840.13(a). This court previously noted that Section 503(a)(7) supports the Secretary's power to require state programs to meet the stringency standards of both the Act and the Secretary's regulations. Section 503(a)(7), however, authorizes state program consistency with the Secretary's regulations so long as they are not inconsistent with the Act or arbitrary or capricious. Mere recitation of this Section, without demonstrating a rational relationship between the regulation and the Act, fails to meet the standard by which this court must adjudicate the regulations.[10]

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[10] Imposition of a uniform civil point system upon the states is unlike requiring state programs to include citizen access and civil suit provisions. The court upheld these provisions based on lan-

II. AREAS UNSUITABLE FOR MINING

Prohibition of mining activities results from the designation of land as unsuitable for mining. The Act details two methods by which land may be so designated: 1) Section 522(e) of the Act, 30 U.S.C. § 1272(e), delineates areas considered per se unsuitable; and 2) Section 522(a) empowers the regulatory authority to designate land unsuitable for mining according to guidelines enunciated in Section 522(a)(3). 30 U.S.C. § 1272(a). There is little question that the Secretary may promulgate regulations with respect to Section 522. The court has previously identified Sections 501(b), 701(25), 201(c)(2), and 503(a)(7). These sections grant the Secretary broad authority to develop regulations that implement the goals of the SMCRA and relate to the procedures and requirements of a state program. Therefore, this court must examine each regulation objected to by the various plaintiffs to determine whether it is arbitrary, capricious, or inconsistent with law.

A. Unsuitability Regulations Pursuant to Section 522(e)

Section 522(e) of the Act delineates per se designations of unsuitability for surface mining. These include,

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guage in Section 521(d). The court found citizen suits, expressly articulated in Section 520(a) of the Act, to constitute one of the procedures incorporated within Section 521(d). Similarly, the court concluded that citizen access is encompassed within the "enforcement provisions" of Section 521.

Herein, Section 518(i), like Section 521(d), requires state programs to incorporate penalties and procedures no less stringent than those set forth in the Act. But neither the penalties of Section 518(i), nor the procedures enforcing those penalties, refer to a point system. It is therefore arbitrary to require the states to exactly parallel the Secretary's penalty system.

A state must nonetheless incorporate the four criteria enumerated in the Act within its own penalty system. Section 518(a) of the Act, 30 U.S.C. § 1268(a).

inter alia, lands within the boundaries of the National Park System, Wildlife Refuge System, Wilderness Preservation System, and national forests. Surface mining is also prohibited if it threatens to affect adversely a historical site registered in the National Register of Historic Sites. Section 522(e) of the Act also prohibits mining within one hundred feet of a public road, and within 300 feet of an occupied dwelling. Any land qualifying under one of these designations, at the time of enactment of the Act is per se unsuitable for mining.

1. Valid Existing Right

Property that qualifies as a "valid existing right" constitutes an exception to the per se rule of Section 522(e) of the Act. 30 U.S.C. § 1272(e). The statute fails to define valid existing rights; however, the regulations define the term at 30 C.F.R. § 761.5 44 Fed. Reg. 15342 (1979). According to the regulation, a valid existing right requires: 1) a valid conveyance or lease with a document expressing contemplation of future underground or surface mining; and 2) receipt by the lessee or owner of all necessary state and federal permits required to commence mining operations.

Various plaintiffs raise four issues pursuant to the regulatory definition: 1) whether Congress intended to preserve private property rights recognized under state law; 2) whether the Secretary's construction of valid existing right constitutes an unconstitutional taking of property under the Fifth Amendment; 3) whether the "all permit" test is arbitrary and capricious; and 4) whether the need and adjacent test unduly expands the scope of valid existing rights.

a. State law

The National Coal Association ("NCA") contends that Congress intended the term valid existing rights to en-

compass property rights recognized as valid under state case law. The NCA brief cites ample support for this contention.

The Secretary has conceded this point, thereby removing the necessity of a court ruling in this matter. In a notice of suspended regulations,the Acting Assistant Secretary of Energy and Minerals, Charles P. Eddy, stated that "OSM has agreed that as an alternative to the present regulatory language, existing State law may be applied to interpret whether the document relied upon establishes valid existing rights." November 23, 1979 Notice at 5. According to the government brief, the Secretary will revise the term to state that "documents dealing with property rights entitling one to surface mine coal will be interpreted in accordance with appropriate state court decisions," Brief at 76.[11]

b. Fifth Amendment Taking

Both Illinois and the NCA object to the definition of valid existing rights on constitutional grounds. They argue that the term, as presently defined, entails taking of property proscribed by the Fifth and Fourteenth Amendments. According to the plaintiffs, a person who owns property, or who owns the right to mine property, may be deprived of his reasonable use and expectation of mining because he fails to meet the strictures of the regulatory definition. Significantly, the Secretary's definition of valid existing right allegedly necessitates more than a property right or legal interest.

The NCA and Illinois cite *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). In *Mahon*, the plaintiff sold the surface rights of property but expressly reserved

[11] This also moots Illinois' objection to 30 C.F.R. § 761.12(b). Illinois objected to this regulation because it directed the regulatory authority to determine the existence of a valid existing right without looking to applicable state court decisions.

the right to mine the underlying coal. Pennsylvania subsequently enacted a statute prohibiting coal mining that could cause the subsidence of a residence. The Court held the statute constituted a taking without just compensation.

The government cites *Penn Central Transportation Co.* v. *New York City* 438 U.S. 104 [11 ERC 1801] (1978). In *Penn Central* the Court ruled that the governmental denial of an additional structure on the site of a historic landmark failed to constitute a taking of property.

The Secretary also alleges that courts should construe narrowly a taking of property when government regulation is designed to further public health and safety. For example, the *Gildberg* v. *Hempstead*, 369 U.S. 590 (1962), the Court upheld a municipal ordinance banning excavation below the water table. The ordinance was enacted as a safety measure. Although the ordinance prevented a sand and gravel company from continuing certain operations, the Court refused to find a taking. *See also Mugler* v. *Kansas*, 123 U.S. 623, 668 (1887) (prohibition on use of property injurious to health and safety of community not a taking). The Secretary argues that the SMCRA, like the Acts in *Mugler* and *Goldberg*, purports to advance a public interest. He further notes that the Court in *Mahon* recognized the Pennsylvania statute reflected a limited public interest.

Although we find the government arguments persuasive, we feel this issue is premature. The Court noted in *Penn Central* "that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" 438 U.S. at 124. Herein the plaintiffs' claim is hypothetical; they have presented the court with no specific circumstances enabling the court to adjudicate this issue. Since no party can complain of an uncon-

stitutional taking, we decline to address the constitutionality of the Secretary's definition. *See DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1967) (District Court should refrain from deciding "constitutional questions in a vacuum").

c. All Permits Test

NCA lastly objects to the "all permits" test. This test necessitates that a land owner must have obtained all permits necessary for the mining of coal prior to August 3, 1977, 30 C.F.R. § 761.5(a)(2)(i), 44 Fed. Reg. 15342 (1979). Industry argues it often must obtain as many as ten permits prior to the commencement of mining. It further alleges that state or federal entities sometimes delay the issuance of a permit through bureaucratic delay. The dilatoriness of a government agency could therefore result in the denial of a valid existing right exception to the per se unsuitability standards.

The government avers that the all permits test ensures consonance with the taking cases. It requires an operator to expend a sizeable investment, and possess a substantial expectation of mining, in order to qualify for a valid existing right. This rationale is self defeating. Surely an operator who applies for all permits, but fails to receive one through government delay, engenders the same investments and expectations as an operator who timely receives all permits. The court believes that a good faith attempt to obtain all permits beforethe August 3, 1977 cut-off date should suffice for meeting the all permits test. The court therefore remands 30 C.F.R. § 761.5 (a)(2)(i) to the Secretary for revision.

d. Need and Adjacent Test

The National Wildlife Federation ("NWF") objects to the need and adjacent component of the valid existing rights delineation. This section allows the grant of a valid existing right if "the coal is both needed for, and immediately adjacent to, an on-going surface coal mining

operation for which all permits were obtained prior to August 3, 1977." 30 C.F.R. § 761.5(a)(2)(ii), 44 Fed. Reg. 15342 (1979). The NWF believes this section of the definition unduly expands the concept of valid existing right. It urges the court to eliminate the "need for" component; instead, a valid existing right can properly be granted only to an operator who possesses all permits prior to the Act's passage.

The need and adjacent component of the Secretary's definition is consonant with Supreme Court declarations regarding taking of property. This test allows the grant of a valid existing right exemption when extension of mining to an adjacent area is necessary to maintain, as a whole, the value of the mining operation. Stated otherwise, the need and adjacent test requires a valid existing right exemption when denial of mining on the adjacent area will rob the mining operation, as a whole, of its value. *See Penn Central, supra*, 438 U.S. at 130-31; *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962). The need and adjacent test is thus a rational method allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations.

2. Waiver by Owner

Section 522(e)(5) of the Act prohibits surface mining operations "within three hundred feet from any occupied dwelling, unless waived by the owner thereof." 30 U.S.C. § 1272(e). The NCA objects to the Secretary's regulations that require a written waiver. 30 C.F.R. §§ 761.11(e) and 761.12(e); 44 Fed. Reg. 15343 (1979). The NCA believes the common law understanding of waiver fails to require a written form.

The court finds these regulations are consonant with the Act. The Act explicates one of its purposes as the protection of the rights of property owners. Section 102(b) of the Act, 30 U.S.C. § 1202(b). Sections 201

(c)(2) and 501(b) of the Act grant the Secretary authority to promulgate regulations "necessary to carry out the purposes and provisions of this Act." The Secretary's requirement of a written waiver merely employs a procedural safeguard to protect private property rights. *See Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1972) (regulations permissible to prevent violation of Act's policy objectives). Moreover, the common law, while it does establish the substantive standards of knowledge, intention, and voluntariness, fails to specify the requisite form of waiver. The Secretary's regulation seeks to ensure these standards are protected; it is, therefore, consonant with the Act.[12]

3. Government Concessions

Section 522(e)(3) of the Act, 30 U.S.C. § 1272(e), prohibits surface coal mining operations affecting "any publicly owned park or places included in the National Register of Historic Sites." 30 C.F.R. § 761.11(c) and .12(f) extended this prohibition to surface mining operations affecting places "eligible for listing" in the National Register of Historic Places. The NCA and Virginia object to this extension.

The government has conceded this issue. The affidavit of Walter N. Heine, Director of the Office of Surface Mining Reclamation and Enforcement, states at paragraph G:

> An amendment will be proposed to portions of Subchapters F & G to delete the limitation on surface mining operations conducted under approved State programs which will adversely affect places eligible for listing on the National Register of Historic Places.

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[12] The NCA also objects to the requirement that a waiver by a previous owner is ineffective against subsequent owners. The Heine affidavit, paragraph F, suspends this requirement.

The government has also conceded NCA's objection to the definition of "public road." Section 522(e)(4) of the Act, 30 U.S.C. § 1272(e)(4), prohibits surface mining operations "within one hundred feet of the outside right-of-way line of any public road . . ." 30 C.F.R. § 761.5 defines public road as "any thoroughfare open to the public for passage of vehicles." The NCA urges a more narrow definition of public road; namely, a right-of-way maintained by a governmental agency. The Heine Affidavit, paragraph D, has suspended this section of the regulation and instructed the Secretary to promulgate a more narrow definition.

B. Unsuitability Regulations Pursuant to Sections 522(a)-(d)

Sections 522(a)-(d) of the Act, 30 U.S.C. §§ 1272(a)-(d), provide a mechanism whereby a state regulatory authority may designate areas unsuitable for mining. Section 522(a) requires each state to establish a planning process to enable the regulatory authority to reach unsuitability determinations. The regulatory authority must find an area unsuitable for mining if reclamation "is not technically and economically feasible." Section 522(a)(2) of the Act, 30 U.S.C. § 1272(a)(2). The regulatory authority may, in its discretion, deem an area unsuitable for mining if, inter alia, it finds that mining operations: 1) are incompatible with state or local land use plans; or 2) affect renewable resource lands; or 3) affect natural hazard lands thereby endangering life or property. Section 522(a)(3) of the Act, 30 U.S.C. § 1272(a)(3).

1. Hearing for Unsuitability Determinations

Section 522(a) of the Act, 30 U.S.C. § 1272(a), requires a regulatory authority to conduct a hearing prior

to reaching a determination on suitability.[13] The NCA, Illinois, and Virginia object to the form of the hearing explicated at 30 C.F.R. § 764.17(a). 44 Fed. Reg. 15346 (1979). This regulation provides that "[t]he hearing shall be legislative and fact-finding in nature, without cross-examination of witnesses." The NCA and Illinois argue that an adjudicatory type hearing is necessary. Virginia believes the choice between an adjudicatory and legislative type hearing should lie within the sound discretion of the regulatory authority.[14]

The various plaintiffs objecting to this regulation argue: 1) the language of Section 522(c) indicates an intent for an adjudicatory hearing; 2) the nature of the decision, requiring a determination of factual issues, necessitates an adjudicatory hearing; and (3) an adjudicatory hearing is constitutionally required.

As to the language of the Act, the court notes that Congress expressly provided for public hearings at several points in the SMCRA. This court previously found:

> When Congres intended that public hearings conducted under the Act be held in accordance with the procedures of 5 U.S.C. § 554, it explicitly stated the requirement. See 30 U.S.C. §§ 1264(c), 1268(b), 1275(a)(2), 1275(d), 1293(b). The public hearing requirement of § 521(a)(5) does not contain such a requirement and Congress did not indicate that the hearing should be "on the record" which further indicates that the APA does not apply.

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[13] If all petitioners stipulate to a withdrawal of the hearing request, then the hearing need not be held.

[14] The Secretary notes that nothing prevents the state regulatory authority from providing additional procedural safeguards in unusual circumstances. The court, therefore, confronts this issue as whether, under normal circumstances, an adjudicatory type hearing is required.

In Re Surface Mining Regulation Litigation, 456 F.Supp. 1301, 1322 (D.D.C. 1978). The same reasoning is applied to Section 522(c) of the Act.

Furthermore, the nature of the decision gravitates toward a legislative rather than an adjudicatory hearing. A suitability decision involves conflicting value determinations that affect several parties.[15] Rulemaking is superior to adjudication in this type of situation. As stated in *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 118 [13 ERC 1376] (D.C. Cir. 1978):

> The standards affect the multitude who fish, take drinking water, or otherwise, directly or indirectly, come in contact with waters containing the discharged toxic substances, all of whom may appear in proceedings . . . Rulemaking, not adjudication, is the appropriate flexible procedural mechanism to accommodate the input of all concerned.

As with the proceedings involving toxic pollutant standards in *Hercules*, the proceedings determining suitability for surface mining involve a multitude of interests. The Act recognizes this variety of interests by providing for intervention in the proceedings.

Finally, 30 C.F.R. § 764.17(a) passes constitutional muster. Due proces guarantees are met. The procedures at issue guarantee notice and a prior hearing. The plaintiffs could point to no case dictating that procedural due process requires more protection against the potential deprivation of property. As for taking, this court decided, *supra*, the issue is premature.

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[15] The regulatory authority must balance several policies in reaching a Section 522(a)(3) determination. These include: the benefits of the reclamation project versus land use plans; historic, cultural, scientific and esthetic values; water supply; productivity; and geology. *See* Section 522(a)(3)(A).-(D). Such policy conflicts necessitate rulemaking that concerns an area of land rather than one particular operation.

2. Additional Designation Criteria

The NCA alleges that 30 C.F.R. § 762.12(b), 44 Fed. Reg. 15344 (1979), impermissibly allows the Secretary to establish additional criteria for making suitability determinations. We note initially the symmetry of 30 C.F.R. § 762.12. Subsection (a) authorizes a state regulatory authority to establish additional criteria for determining suitability of land for surface coal operations. Subsection (b) grants the Secretary the same authority to establish additional criteria for federal lands. The NCA believes that, although Section 505(b) of the Act, 30 U.S.C. § 1255(b), provides statutory support for 30 C.F.R. § 762.12(a), there is no corresponding support for 30 C.F.R. § 762.12(b).

The court finds that Section 523(a) of the Act, 30 U.S.C. § 1273(a), provides similar, or, even stronger support for 30 C.F.R. § 762.12(b), as that provided by Section 505(b) for 30 C.F.R. § 762.12(a). Section 523(a) of the Act (federal lands) states: "The Federal lands program shall, at a minimum, incorporate all of the requirements of this Act and shall take into consideration the diverse physical, climatological and other unique characteristics of the Federal lands in question." The language "at a minimum" indicates Congressional authorization for the Secretary to establish additional criteria for federal lands. Similarly, the language "more stringent" in Section 505(b) of the Act, permits state regulatory authorities to promulgate factors in addition to those enumerated in the SMRCA.

3. Approval to Explore Unsuitable Lands

30 C.F.R. § 762.14, 44 Fed. Reg. 15344 (1979), necessitates regulatory authority approval before exploration may occur on lands designated unsuitable for surface coal mining operations. The NCA believes this regulation is inconsistent with Section 522(a)(1) and

512 of the Act, 30 U.S.C. §§ 1272(a)(1) and 1262. Section 522(a)(1) states that a designation of unsuitability "shall not prevent the mineral exploration pursuant to the Act of any area so designated." Section 512(d) requires written approval of the regulatory authority for exploration activities that remove more than 250 tons of coal. The NCA argues these stautory sections, by implication, prevent the Secretary from requiring written approval for coal exploration activities that remove less than 250 tons.

The court finds 30 C.F.R. § 762.14 is consonant with Congressional intent to protect areas of land designated as unsuitable for surface mining operations.[16] Section 522 of the Act, 30 U.S.C. § 1272, providing a detailed process for the designation of unsuitable lands, evinces such intent. Section 522(a)(3) expresses Congressional concern that land falling within the criteria enumerated herein be free from the adverse effects of surface mining. 30 C.F.R. § 762.14(e) ensures that coal exploration, on lands declared unsuitable for mining, will not conflict with the values expressed in Section 522(a)(3).

Moreover, prior approval fails to imply lack of exploration. The Secretary has made clear that the approval process is only to oversee the exploration method and to guarantee that such methods not disturb the reasons for the unsuitability designation. The Secretary stated in the preamble:

> Regulatory authority approval does not mean denial of the right to conduct exploration for coal; its purpose is to ensure that the methods used in explora-

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[16] The court does not read Section 512(d) to mean the Secretary cannot require written approval for coal exploration removing less than 250 tons. Section 512(d) merely requires approval for any exploration removing more than 250 tons. It is silent on whether, and, in what situations, approval may be necessary for exploration removing less than this amount.

tion operations are compatible with the protection of those lands and areas designated unsuitable for mining.

44 Fed. Reg. 14999 (1979). Scrutinization of the method of exploration for lands designated as unsuitable for mining is therefore consonant with Sections 512(a) & (d) and 522 of the SMCRA.

4. Limitation on Petition for Unsuitability Finding

Section 522(c) of the Act, 30 U.S.C. § 1272(c), allows any person to petition the regulatory authority for an unsuitability designation. 30 C.F.R. § 764.13(b), 44 Fed. Reg. 15345 (1979), delineates the minimum informational requirements for the petition. Virginia objects to language in this regulation, which states that the requirements of 30 C.F.R. § 764.13(b) constitute the "only information that a petition need provide." A state regulatory authority, according to Virginia, should enjoy the discretion to require additional information.

The court belives that 30 C.F.R. § 764.13(b) is reasonable and consistent with the Act. This regulation protects the regulatory authority against frivolous petitions. It also protects the petitioner against overly burdensome informational requirements. Moreover, the regulation does not prohibit a state regulatory authority from requiring additional information. While such additional information could affect the outcome of the petition, failure to provide it cannot alone warrant dismissal. Finally, the language objected to allows consonance with the Act. As stated by the Secretary in the preamble: "OSM has rejected most of these suggestions [for additional information] in order to make the requirements for petition contents more restricted than the Act." 44 Fed. Reg. 15001 (1979).

5. Data and Information Availability

Section 522(a)(4)(B) of the Act, 30 U.S.C. § 1272 (a)(4)(B), requires a state to develop a data base and inventory system to evaluate the capacity of land to support coal mining operations. Illinois objects to language in 30 C.F.R. § 764.23(a), 44 Fed. Reg. 15346 (1979), commanding this information and data be available to the public free of charge.

Illinois' objection is without merit. Section 102(i) of the Act, 30 U.S.C. § 1202(i), states that one purpose of the SMCRA is to "assure that appropriate procedures are provided for the public participation . . . under this Act." Free access to information is entirely consonant with this section of the SMCRA. Moreover, it is only the access and inspection of information that a state must provide free of charge. The regulation expressly allows a state to charge a reasonable cost for copying services.

6. Prohibition of Mining If Affects Protected Area

Section 522(e)(3) of the Act, 30 U.S.C. § 1272(e)(3), allows government agencies with jurisdiction over parks or historic sites to approve or disapprove of surface mining operations when such operations will adversely affect the site. 30 C.F.R. § 761.12(f), 44 Fed. Reg. 15343 (1979), permits government agency participation if mining operations may adversely affect the site. Virginia alleges that substitution of "will" in the Act, with "may" in the regulation, unduly expands the veto power of government agencies outside of the regulatory authority.

The Secretary has suspended this regulation, thereby mooting the issue. Heine Affidavit, paragraph G.

III. PERMITTING

In addition to regulations prescribing substantive criteria for state programs, the Secretary promulgated reg-

ulations pursuant to the permit process and bond requirements. The SMCRA enumerates the permit application requirements at Sections 507-11, and the bonding requirements at Sections 509 and 519. Under the Act, any mining operation must obtain a permit from an approved state program, or, if the state fails to submit or receive approval of its program, from the federal authority. After a permit has been approved, but before the regulatory authority issues the permit, the applicant must obtain bond. The bond covers reclamation costs should the mining company fail to fulfill the requirements of the Act.

1. Secretary's Power to Prescribe Permit and Bonding Regulations

The Act makes clear that the regulatory authority—state or federal—decides whether to grant the permit and determines the amount and acceptance terms of the bond. This court has already decided that a state program must meet the minimum standards of the Act and of the Secretary's valid regulations. Peabody and the Pennsylvania Coal Mining Association ("PCMA") herein present the issue whether the Secretary validly possesses the power to prescribe uniform standards for the permit process and bonding requirements.[17]

The industry sets forth two straightforward arguments. First, Section 501(b), which grants the Secretary authority to promulgate regulations pursuant to "procedures and requirements for preparation, submission, and approval of State programs" fail to mention permitting and bonding. This implies the Secretary is without authority to promulgate regulations addressing

[17] The PCMA also alleges the Secretary lacks power to promulgate exploration regulations. The court's analysis upholding the Secretary's power to issue permit and bonding regulation applies with equal force to exploration regulations.

the permit process and bonding system. Peabody and the PCMA secondly argue that the permit and bonding statutory sections repeatedly refer to "regulatory authority" but seldom mention the "Secretary." The Act therefore intended the state regulatory authority to carry out the responsibilities of these provisions without additional guidance from the Secretary.

The court believes that the structure of the Act, the general grants of rulemaking authority, and Section 501(b), support the Secretary's power to develop permitting and bonding regulations. At the outset, the court questions why the PCMA and Peabody believe the Act grants the Secretary authority to promulgate regulations under several provisions of the Act but denies the Secretary authority under other sections.[18] The most basic reason advanced by the plaintiffs concerns the Act's repeated reference to "regulatory authority" in the permitting and bonding provisions. But regulatory authority means the state regulatory authority only when the Secretary has approved a state program. Section 701 (22) of the Act, 30 U.S.C. § 1311(22) of the Act, 30 U.S.C. § 1311(22). The Act defines a state program as "a program established by a State . . . in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act . . ." The Act's reference to regulatory authority thereby encompasses the concept that a state program must be consonant with regulations developed by the Secretary.

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[18] Illinois argued the Act failed to grant the Secretary authority to promulgate any regulations. *See* opinion at 3-7. Herein, both the PCMA and Peabody concede that the Act grants the Secretary rulemaking authority. According to Peabody:

> [T]he Act gives the Secretary authority to prescribe regulations under Title V in respect to review of state programs, performance standards, and federal lands, and in respect of his supervision of state inspections.

Brief at 6. The PCMA takes a more parsimonious view of the Secretary's rulemaking authority. It believes the Act limits the Secretary's regulations to performance standards and procedures for the submission of state programs. Brief at 1.

Moreover, the Act contains a general grant of rulemaking authority to the Secretary. Section 201(c)(2) of the Act, 30 U.S.C. § 1211(c)(2), grants the Secretary authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act." [18A] The court cited this section in upholding the Secretary's ability to promulgate regulations for state programs. But Section 201(c)(2) is particularly significant herein because it fails to restrict the Secretary's rulemaking authority to specific areas of the Act.[19]

As for Section 501(b), the court declines to view this section as restricting the power of the Secretary. First, the general grants of rulemaking authority, identified above, cannot be restricted by further, specific grants of rulemaking authority. If the Secretary's powers are limited to the specific grants of the Act, then the general grants of rulemaking authority are superfluous.

Second, Section 501(b) directs the Secretary to establish "*requirements* for preparation, submission, and approval of State programs . . ." These requirements, spe-

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[18A] The court finds the permit, bonding, and exploration operations relate to several purposes of the SMCRA. *See, e.g.*, § 102(a) (protection against adverse effects of surface mining); § 102(c) (prohibition of mining where reclamation unfeasible); § 102(d) (protection of environment); § 102(e) (assurance of adequate reclamation); § 102(h) (reclamation of previously unreclaimed land).

[19] Section 201(c)(2) achieves its full significance when read in tandem with the Act's definition of a state program. As explained above, a regulatory authority means state authority only when the Secretary has approved the state program. And the Act defines a state program as meeting the Secretary's regulations. Since the Act grants the Secretary broad rulemaking authority under Section 201(c)(2), approval of a state program necessarily entails consistency with the Secretary's permitting and bonding regulations.

cified in Section 503 of the Act, include: 1) an effective permit system, Section 503(a)(4), and 2) sanctions for the forfeiture of bonds. Section 503(a)(2). Section 501(b), read in connection with Section 503(a), thus empowers the Secretary to promulgate regulations setting the requirements for permitting and bonding.

Finally, the court notes that the primary purpose of the Act was the establishment of national environmental standards to govern surface mining operations. Section 501(b) expressly empowers the Secretary to regulate "surface coal mining and reclamation operations performance standards . . " The permit and bonding regulations are inextricably linked to the environmental performance standards. They help to ensure compliance with the standards enumerated in Section 515 of the Act.[19A]

2. Notice of Intent for Coal Exploration Extracting Less Than 250 Tons

The SMCRA provides that coal exploration regulations shall apply to "exploration operations which substantially disturb the natural land surface . . ." Section 512(a) of the Act, 30 U.S.C. § 1262(a). The PCMA objects to the Secretary's regulation that per se requires the filing of notice of intent to explore for operations removing less than 250 tons. 30 C.F.R. § 776.11, 44 Fed. Reg. 15351-52 (1979). The PCMA believes the per se notice privision is inconsistent with the Act's commandment that explora-

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[19A] The court does not uphold the Secretary's power to promulgate permit, bonding, and exploration regulations without examining the legislative history. Our examination reveals that the Senate, House, and Conference Committee Reports failed to directly address this issue. Absent clear legislative history to the contrary, statutory language granting an agency authority over a particular subject area mandates upholding the power of that agency to promulgate regulations thereunder. *National Small Shipments Traffic Conference, Inc.* v. *Civil Aeronautics Board*, No. 78-2163 (D.C. Cir. Feb. 11, 1980), Slip. Op. at 17.

tion operation regulations, apply to activities substantially disturbing the surface.

30 C.F.R. § 776.11 is consistent with the Act. The court recognizes that Section 512(d) requires written approval for removal of more than 250 tons. But the regulation at issue-applying to removal of less than 250 tons—does not require a permit or prior approval. It merely requires a notice of intent to explore. This regulation therefore properly allows the regulatory authority to determine whether the exploration will substantially disturb the surface. If it does, then the coal exploration regulations apply. Section 512(a) of the Act.

3. Public Access to Information

The PCMA alleges that 30 C.F.R. § 776.17 is inconsistent with Section 512(b) of the Act, 30 U.S.C. § 1262 (b). Section 512(b) withholds from public examination information, pursuant to coal exploration permits, that constitutes trade secrets or financial information relating to competitive rights. 30 C.F.R. § 776.17, 44 Fed. Reg. 15353 (1979), implements this statutory provision. It provides that such information be withheld from the public if: 1) the submitter requests nondisclosure; and 2) the regulatory authority finds the information qualifies as trade secrets or commercial or financial information concerning competitive rights. The PCMA believes such information is per se confidential.

30 C.F.R. § 776.17 is consistent with the Act and reconciles a conflict between Sections 512(b) and 517(f). 30 U.S.C. §§ 1262(b) and 1267(f). Section 517(f) requires that "information obtained under this title by the regulatory authority shall be made immediately available to the public . . ." Section 512(b) is an exception to this rule. Regulation 30 C.F.R. §§ 776.17 properly asks the regulatory authority to examine the information and determine whether it qualifies for the exemption to disclosure.

A similar procedure exists under the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552. As with the SMCRA, disclosure is the general rule. Exemption four of the FOIA contains an exception for trade secrets and privileged commercial or financial information. A claim of confidentiality under exemption four does not automatically result in nondisclosure. The agency must still independently examine the information and decide if it qualifies for the exemption. *Chrysler Corp.* v. *Brown*, 99 S.Ct. 1705, 1713 (1979) ("the FOIA by itself protects the submitter's interest in confidentiality only to the extent that the interest is endorsed by the agency collecting the information.").

4. Mine Plan Area Information Requirements

Peabody objects to the Secretary's use of the term "mine plan area." This term appears nowhere in the Act. The regulations employ the term in parts 779, 780, 783, and 784, and define the term at 30 C.F.R. § 701.5. Mine plan area means the area of land and water "within the boundaries of all permit areas during the entire life of the surface coal mining and reclamation operations." This term necessitates coal companies to supply information for areas outside the permit boundary. It also requires information covering the entire life of the mining operation. Peabody claims the Act necessitates this information in only a limited number of situations.

The court finds the government's justification for this monumental informational requirement unpersuasive. The government points to Sections 507(b)(11) and 508(a)(13) of the Act. 30 U.S.C. § 1297(b)(11); 30 U.S.C. § 1258(a)(13). These sections require hydrologic information both on and off the mine site. In addition, Section 508(a)(1) requires information extending over the estimated life of the mining operation. But the myriad of informational requirements delineated in Section 507

and 508 consistently refer only to the specific land mined or the immediate permit area. The court can only draw the conclusion that Congress articulated, with specificity, those instances in which information outside the permit area was necessary.

Nor can this expansive informational requirement be justified on the ground of statutory ambiguity. The informational requirements of Sections 507 and 508 are unambiguous. Congress specified what type of information it desired in each subsection. It is arbitrary and capricious for the Secretary to examine the three most expansive informational requests, develop a regulatory definition, and apply the expansive informational requests to less extensive informational needs. The court therefore remands the definition of mine plan area found at 30 C.F.R. § 701.5. The court also suspends the term "mine plan area" in regulations found at 30 C.F.R. §§ 779, 780, 783, and 784. We direct the Secretary to revise the term in accordance with the informational requirements of the Act.

5. Demonstration of Nonsuitable Area

The PCMA attacks 30 C.F.R. § 778.16(a). 44 Fed. Reg. 15354 (1979). This regulation requires the permit application to state whether the proposed permit area is unsuitable for surface mining activities, or under study for such designation. Section 501(b)(4) of the Act makes clear that this regulation is consonant with the Act. The Act states a regulatory authority cannot approve a permit application unless the application demonstrates "(4) the area proposed to be mined is not included within an area designated unsuitable for surface coal mining . . . or is not within an area under study for such designation . . ."

6. Planned Subsidence

30 C.F.R. § 784.20, 44 Fed. Reg. 15369 (1979), requires an underground mining permit application to include a subsidence control plan. The plan must specify, inter alia, whether the permit area encompasses structures or renewable resource land, and also whether subsidence would cause damages to these assets.

The NCA believes this regulation conflicts with Section 516(b)(1) of the Act. 30 U.S.C. § 1267(b)(1). This statutory section requires an operator to "adopt measures consistent with known technology in order to prevent subsidence . . . except in those instances where the mining technology used requires planned substance in a predictable and controlled manner."

The NCA correctly notes that the "except" clause of Section 516(b)(1) refers to longwall mining. "This [except clause] specifically allows for the uses of longwall and other mining techniques which completely remove the coal." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 126 (1977). The NCA interprets the except clause to exempt longwall mining operations from subsidence permit application requirements.

The NCA misreads both the Act and the regulation. Section 516(b)(1) affords the operator an option to prevention of subsidence when he demonstrates predictable and controlled subsidence through longwall mining. But the operator must establish "planned and controlled subsidence." It is only through the filing of a subsidence control plan that the regulatory authority can determine eligibility for the use of mining methods that allow mine collapse. This report enables the regulatory authority to determine whether the controlled subsidence will protect the values Section 516(b)(1) intends to preserve.

7. *Testing Each Strata of Overburden*

The PCMA challenges 30 C.F.R. § 779.14(b)(iii)-(v). 44 Fed. Reg. 15355 (1979). This regulation requires the permit application to inclde compactibility and erodibility testing for each strata of the overburden, analysis of the coal seam, and a chemical analysis of each strata of the overburden including the stratum immediately below the lowest coal seem to be mined.

The PCMA believes these informational requirements exceed the dictates of the Act. It specifically points to Section 507(b)(15) of the Act, which requires a chemical analysis of *potentially* acidic or toxic forming sections of the overburden.

Several sections of the Act support the consistency of 30 C.F.R. § 779.14(b) with the informational requirements of the SMCRA. For example, Section 508(a)(12) of the Act, 30 U.S.C. § 1258(a)(12), requires the reclamation plan to contain:

> The results of test borings which the applicant has made of the area to be covered by the permit . . ., including the location of subsurface water and an analysis of the chemical properties of the mineral and the overburden . . .

Furthermore, Section 507(b)(14) of the Act, 30 U.S.C. § 1257(b)(14), requires the permit application to contain maps or plans that detail the:

> pertinent elevation and location of test borings or core samplings and depicting the following information: the nature and depth of the various strata of overburden . . . the nature and thickness of any coal or rider seam above nature of the stratum immediately beneath the coal to be mined . . .

Chemical analysis of each stratum of the overburden properly implements the informational requirements of

these statutory sections. The disputed regulations therefore fail to require additional information not previously necessitated by the SMCRA.

8. Fish and Wildlife Information

The PCMA attacks the regulations requiring information on fish and wildlife. 30 C.F.R. § 779.20, 44 Fed. Reg. 15356; 30 C.F.R. § 780.16, 44 Fed. Reg. 15359 (1979). These regulations require the permit application to contain a study of fish and wildlife, and, in addition, to include a fish and wildlife reclamation plan. The PCMA alleges these regulations lack statutory authorization.

The only statutory justification offered by the Secretary pertains to performance standards. Although the court employed enforcement of performance standards as one reason to uphold the Secretary's ability to promulgate permit and bonding regulations, the court nonetheless believes the Secretary's regulations in these areas must find statutory support in the permit and bonding sections of the Act. Absent statutory reference in the permit section of the statute to fish and wildlife, the court remands 30 C.F.R. § 779.20 and § 780.16.

9. Soil Survey Information

Peabody and the PCMA attack 30 C.F.R. § 779.21 and 783.21 insofar as they require soil survey information for lands failing to qualify as prime farmland. The industry believes such information exceeds the requirements of Section 507(b)(16) of the Act, 30 U.S.C. § 1257 (b)(16). Section 507(b)(16) requires a soil survey only "for those lands in the permit application which a reconnaissance inspection suggests may be prime farm lands."

The court agrees with Peabody and the PCMA, and will remand these regulations. The court recognizes that

nothing in the Act prohibits this information.[20] But Section 507(b)(16) is a clear expression of Congressional intent. It requires a permit applicant to engage in reconnaissance inspections. A permit application must contain a soil survey only when this inspection reveals prime farmland. Moreover, the soil survey is limited to that portion of the permit area designated as prime farmland.

The Secretary's reliance on Section 508(a)(3) is also misplaced. That section requires the reclamation plan to demonstrate "the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses . . ." Demonstration of post mining land use and a discussion of alternative uses in no way suggests an operator must provide soil survey information for land other than prime farmland.

10. Denial for Willful Violation

Peabody challenges the regulatory definition of "willful violation." The term appears in Section 510(c) of the Act, 30 U.S.C. § 1260(c). That section prohibits the grant of a permit to a company that has engaged in willful violation of the Act resulting in irreparable injury to the environment.

The regulations define the term willful violation as an "act or omission . . . committed by a person who *intends the result* . . . (emphasis added) 30 C.F.R. § 786.5, 44 Fed. Reg. 15378 (1979). Peabody argues that willful must encompass the notion of knowing culpability, or, purposeful noncompliance with the Act. The Secretary's definition of "intending the result" includes unknowing ignorance.

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[20] The court believes that lack of prohibition constitutes an insufficient justification for regulations imposing informational requirements upon the permit application.

The Secretary's definition of willful is valid. To violate the Act, an operator must previously have possessed a permit. An operator who receives a permit should be aware of the Act's requirements. A person's negligence in failure to know the requirements of an Act, under federal case law, constitutes a willful violation. *United States* v. *Illinois Central Ry.*, 303 U.S. 239, 243 (1938); *Brennan* v. *Heard*, 491 F.2d 1, 3 (5th Cir. 1974); *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

11. Oral Proof and Cross-Examination in State Permit Hearings

Section 514(c) of the Act, 30 U.S.C. § 1264(c), ensures that an applicant for a mining permit, or any person adversely affected by a permit decision, may demand a hearing to contest the initial regulatory authority determination. The statute provides that "[w]here the regulatory authority is the State, such hearing shall be of record [and] adjudicatory in nature . . ."

The Secretary implements this provision at 30 C.F.R. § 787.11(b). The NWF objects to the regulation's omission to affirmatively incorporate the right of oral argument and cross-examination of witnesses. This issue, however, is now moot. The Secretary has decided that Section 514(c) of the Act does require the State permit hearing to incorporate the procedural safeguards of Section 5 of the Administrative Procedure Act. October 29, 1979 Letter to Messrs. Thatcher and Galloway from Walter N. Heine, Director, Office of Surface Mining.

IV. BONDING

1. Cessation of Operations Upon Insolvency of Surety

The NCA objects to regulatory provisions requiring the immediate discontinuance of mining operations upon the insolvency of surety or the revocation of the surety's

license. 30 C.F.R. §§ 806.12(e)(6)(iii), (g)(7)(iii). The Heine affidavit, Paragraph K, as implemented by this court's order of December 21, 1979, suspends the effect of these regulations.

2. Public Participation in Bond Release Programs

Section 519(g) of the Act, 30 U.S.C. § 1269(g), provides that in the case of written objections to the release of an operator's performance bond, "the regulatory authority may establish an informal conference as provided in Section 513 to resolve such written objections." Section 513(b) of the Act, 30 U.S.C. § 1263(b), establishes the procedural aspects of an informal conference. It provides:

> The regulatory authority may arrange with the applicant upon request by any party to the administrative proceeding access to the proposed mining area for the purpose of gathering information relevant to the proceeding.

The NWF alleges that the language of Section 519(g) intends to incorporate, in its entirety, the informal conference procedures of Section 513(b). Because the Secretary's regulation that implements the informal conference provisions of Section 519 fails to include a provision for access to the minesite the NWF argues that 30 C.F.R. § 807.11(e) is inconsistent with the Act.

The court agrees with the NWF, and will remand 30 C.F.R. § 807.11(e). Section 519(g) of the Act expressly employs the term "informal conference." The Act clearly articulates the procedures attendant upon informal conferences at Section 513(b). One such procedure involves access to the mining area. It is inconsistent with the Act for 30 C.F.R. § 807.11(e) to fail to articulate that, in the words of the statute, "the regulatory authority may arrange with the applicant . . . access to the pro-

posed mining area for the purpose of gathering information relevant to the proceedings." [21]

3. Bond Liability Limit

The NWF objected to 30 C.F.R. § 808.12(c) insofar as it indicated bond liability in the permit area was limited to hydrologic balance. The Secretary has suspended this language. Heine affidavit, paragraph L; December 21, 1979 Order at 2.

4. Forfeiture of Bond as Sanction

30 C.F.R. § 808.13(a)(2) provides that a permittee shall forfeit bond if:

> The permittee has failed to conduct the surface mining and reclamation operations in accordance with the Act, the conditions of the permit, this Chapter, and the regulatory programs, within the time required by the Act, this Chapter, the regulatory program, and permit.

Quite simply, this regulation allows forfeiture of bond if the permittee fails to comply with the Act, the regulatory program, or the permit.

The NCA believes the use of bond forfeiture as an enforcement mechanism is inconsistent with the Act. It alleges that Section 509 (performance bonds) fails to consider bond forfeiture as an enforcement mechanism. Section 521 of the Act (enforcement), according to the NCA, limits the regulatory authority's enforcement tools to the issuance of citations and mine closure.

The court finds 30 C.F.R. § 808.13(a)(2) fully consonant with the Section 509 of the SMCRA. Section 509 (a) expressly requires "a bond for performance . . . con-

[21] The preamble fails to discuss why the regulation did not include an access provision. *See* 44 Fed. Reg. 15120-21 (1979).

ditional upon faithful performance of all the requirements of this Act and the permit." Congress, not the regulations, thereby established the broad requirements upon which bond is conditioned.

The regulation at issue merely establishes a criterion for forfeiture of bond that attaches upon violation of one of the conditions specified in the statute. This criterion addresses timeliness. It allows forfeiture of bond when the permittee fails to perform one of the conditions enunciated in Section 509(a). Moreover, violation of this criterion does not automatically result in bond forfeiture. 30 C.F.R. § 808.11(b) grants the regulatory authority discretion to waive forfeiture upon the permittee's acceptance of a schedule to comply with the violation of the permit condition. Thus, if the permittee fails to abate, fails to agree to an abatement schedule, or fails to meet the abatement schedule, the regulatory authority may forfeit the bond and implement abatement.

5. Forfeiture of Full Bond Amount

Under 30 C.F.R. § 808.14, 44 Fed. Reg. 15393 (1979), a regulatory authority may determine the amount of forfeiture by either of two methods. Under subsection (a), the authority may estimate the cost of reclamation, and, accordingly, forfeit that portion of the bond necessary to cover the reclamation cost. Under subsection (b), the regulatory authority may "[f]orfeit the entire amount of the bond . . . and deposit the proceeds thereof in an interest-bearing escrow account for use in the payment of all costs and administrative expenses associated with the conduct of reclamation, restoration or abatement activities by the regulatory authority." Subsection (b) allows the regulatory authority to retain forfeited bond money unnecessary for the costs and administration expenses associated with reclamation of the particular permit area. The NCA objects to subsection (b) on the

ground that it lacks a statutory basis, is arbitrary, and punitive.

The court agrees with the NCA and will remand 30 C.F.R. § 808.14(b). Section 509 fails to provide any basis for forfeiture beyond the amount necessary to implement and complete a reclamation plan. Section 509 (a) states "[t]he amount of the bond should be *sufficient* to assume the completion of the reclamation plan . . ." (emphasis added). This indicates that a permittee's bond be utilized to complete reclamation for the lands covered by that particular permit. Nowhere does the Act authorize use of the excess bond to pay the administration costs of part of the state program. The court therefore remands this regulation to the Secretary, and directs that if expeditious administration requires a provision allowing for complete forfeiture, then such provision must also require reimbursement of excess costs upon the completion of the reclamation activities.[22]

6. Cost Adjustment for Bond

The PCMA alleges that 30 C.F.R. § 808.14(a), 44 Fed. Reg. 15393 (1979), is arbitrary and capricious because it incorporates 30 C.F.R. § 805.14. That regulation, according to the PCMA, allows the regulatory authority to determine the amount of forfeiture based on an inflationary adjustment.

The PCMA's characterization of 30 C.F.R. § 805.14 is misleading. In its present form, Section 805.14 allows the regulatory authority to adjust a permittee's performance bond "when the cost of future reclamation, restoration or abatement work changes." This revaluation oc-

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[22] We note the initial version of 30 C.F.R. § 808.14(b), 43 Fed. Reg. 41872 (1978), called for full forfeiture, reclamation funded by bond forfeiture, and return of the excess money.

currs only at the time of permit review conducted under 30 C.F.R. § 788.11.

Sections 509(a) & (e) of the Act, 30 U.S.C. § 1259 (a) & (e), require adjustment of bond to meet reclamation costs. Section 509(e) expressly commands that "bond shall be adjusted by the regulatory authority from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes." Therefore, determining the amount of bond to be forfeited, based on bond amounts readjusted in accordance with Section 509(e) of the Act and 30 C.F.R. § 788.11, is entirely consonant with the Act.

V. ALLUVIAL VALLEY FLOORS

An understanding of the terms alluvial valley floor ("AVF") and unconsolidated stream laid deposits is necessary to properly evaluate the plaintiffs' objections and the government's defenses. Certain arid regions in the West contain streams that deposit unconsolidated stream deposits. These unconsolidated deposits—clay, silt, sand, and gravel—are called alluvium. Alluvium is capable of retaining moisture and thereby helps to sustain agriculture during dry periods.

Unconsolidated stream laid deposits assist the irrigation of an alluvial valley floor in two possible ways: 1) rain water from the stream can permeate through the unconsolidated materials, resulting in natural irrigation; and 2) stream water can be artifically diverted onto an alluvial valley floor, traveling through the unconsolidated materials to irrigate the area.

The Act defines alluvial valley floors as "unconsolidated stream laid deposits holding streams where water availability is sufficient for subirrigation [natural] or flood irrigation [artificial]." Section 701(1) of the Act, 30

U.S.C. § 1291(1). The regulations define unconsolidated stream laid deposits to mean:

> all flood plains and terraces located in the lower portions of topograpic valleys which contain perennial or other streams with channels that are greater than 3 feet in bankfill width and greater than 0.5 feet in bankfill depth.

30 C.F.R. § 701.5, 44 Fed. Reg. 15321 (1979). Industry plaintiffs complain that the regulatory definition of unconsolidated stream laid deposits is inconsistent with the Act's definition of alluvial valley floors. They further contend the alluvial valley floor regulations seek excessive information and unduly restrict statutory exemptions from the Act's command to protect alluvial valley floors.

1. Definition of Unconsolidated Stream Laid Deposits Holding Streams

The NCA contends that the Act's definition of an AVF—unconsolidated stream laid deposits holding streams—requires that the valley floor "hold streams" with water sufficient to sustain agriculture. The regulatory definition of unconsolidated stream laid deposits,[23] however, provides a geographic per se definition (there feet

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[23] Peabody is the only plaintiff urging the court to defer a decision on the validity of the regulations clarifying the term alluvial valley floors. It believes the court can properly determine validity only in the context of a specific grant or denial of a permit by a regulatory authority. Section 526(a)(1) of the Act, 30 U.S.C. § 1276, makes clear that "[a]ny action by the Secretary promulgating national rules or regulations" is subject to judicial review in the United States District Court for the District of Columbia within 60 days from the date of their enactment. The regulations defining alluvial valley floors constitute final agency rulemaking subject to judicial review. These regulations fail to engender constitutional issues, for which doctrines of judicial restraint are well established.

by 0.5 feet). The regulatory definition therefore includes numerous dry gulches that the Act did not intend to protect. The NCA cites, as legislative history support, an exchange between Senators Bartlett and Metcalf. This exchange indicates that the definition of alluvial valley floors failed to include dry water course without irrigation capability. 123 Cong. Rec. S8089-97 (daily ed. May 20, 1977).

The NCA misinterprets the meaning of the Secretary's definition of unconsolidated stream laid deposits holding streams. Channel dimensions alone are an insufficient basis for finding an alluvial valley floor. Rather, an alluvial valley floor must satisfy geologic criteria (unconsolidated stream laid deposits meeting the regulation's dimensions) *and* hydrologic criteria (water sufficient to sustain agriculture). Hence, those ephemeral or dry streams incapable of supporting agriculture by natural or artificial means fail to qualify as an AVF.

The Senatorial exchange, cited by the NCA, supports the Secretary's definition of unconsolidated stream laid deposits holding streams. This exchange demonstrates that dry water streams without surface or subirrigation capability are excluded from the definition of an AVF, whereas dry water streams with irrigation capability are subject to the Act's protections.[24] The key is water availability. Congress' concern was the preservation of agriculture. This concern is protected whether the AVF contains natural subsurface irrigation or is capable of irrigation by surface means.

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[24] Senator Melcher stated: "We are really talking about valley floors where you can farm, and where there is irrigation water either on the surface or subsurface, that helps that farming . . . I think the intent of the committee bill that we have before us, is to limit strip mining on valley floors where there is farming done, either by surface irrigation or subirrigation." 123 Cong. Rec. S8089-90 (daily ed. May 20, 1977).

The NCA fear that a deposit bed satisfying the dimensional requirements constitutes a per se AVF is thus unfounded. Once the dimensional criterion is satisfied, only those deposit beds that contain sufficient water to sustain agriculture, or are adjacent to a stream capable of supporting irrigation of the streamlaid deposits, qualify as an alluvial valley floor. The Secretary's definition thus disposes of the NCA's objection and preserves the intent of Congress.

2. Informational Requirements

This court has sustained the ability of the Secretary to promulgate regulations with respect to permitting and bonding. We therefore address whether the informational requirements of the permit application pertaining to AVF's are arbitrary, capricious, or inconsistent with the law.

Peabody objects to 30 C.F.R. § 785.19(a), (c)(1), and (d). 44 Fed. Reg. 15379-76 (1979). This regulation requires an application for mining in, adjacent to, or under an AVF, to contain information specific to alluvial valley floors.

The informational requirements of 30 C.F.R. § 785.19 are consonant with the Act. Several sections of the SMCRA expressly command a permit application to include information unique to alluvial valley floors. For example, Section 510(b)(5) of the Act, 30 U.S.C. § 1260 (b)(5), requires a permit application to demonstrate that the surface coal mining operation "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated." In addition, Section 510(b)(5)(B) of the Act, 30 U.S.C. § 1260 (b)(5)(B), requires a demonstration that the mining "not materially damage the quantity or quality of water in surface or underground water systems that supply these [alluvial] valley floors . . ." Finally, Section 515

(b)(10)(F) of the Act, 30 U.S.C. § 1260(b)(10)(F), requires the operator to preserve "throughout the mining and reclamation process the essential hydrologic functions of alluvial valley floors in the arid and semiarid areas of the country." The Act thus commands an operator, who seeks to mine coal in or around an AVF, to provide additional information in the permit application specific to the values underlying AVF preservation. The regulations at issue merely implement these informational requirements.[25]

Peabody also raises several specific objections to the informational requirements of 30 C.F.R. § 785.19. Two of these arguments address what Peabody terms "redundant negative proof." Peabody first correctly notes that Section 510(b)(5) of the Act, 30 U.S.C. § 1260(b)(5), is inapplicable when farming does not occur in or adjacent to the AVF. It secondly points out that Section 510(b)(5) fails to apply to mining operations that produced coal in commercial quantities prior to August 3, 1977. The regulations nonetheless fail to afford relief from the informational requirements appurtenant to AVF's in these situations.

We note at the outset that the regulations provide a mechanism to avoid the filing of needless information. An applicant may, with the cooperation of the regulatory authority, conduct limited field studies to determine whether the permit area covers an AVF. 30 C.F.R. § 785.19(c), 44 Fed. Reg. 15375 (1979). If these field studies satisfy the regulatory authority that no AFV exists in or adjacent to the permit area, then the application need not address additional informational requirements of 30 C.F.R. § 785.19.

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[25] 30 C.F.R. § 785.19(c) allows the regulatory authority to determine whether the permit application proposes to mine on an AVF. Subsection (d) of Section 785.19 requires additional information if the processes required in subsection (c) reveal the operator proposes to mine on AVF.

As to the agricultural information of Section 510(b)(5), if an AVF fails to encompass agricultural activities, then the permit application need only present rudimentary evidence of lack of farming. Moreover, the Secretary has conceded that agricultural information is unnecessary in situations involving commercial quantities of coal removal prior to August 3, 1977. In both of these situations, however, hydrologic information must still be provided. If the permit area encompasses an AVF, the hydrologic protections of Sections 510(b)(3) and 510(b)(10)(F) apply regardless of whether farming occurs.

Finally, Peabody, argues that the one year time period for hydrologic data, 30 C.F.R. § 785.19(d)(2), 44 Fed. Reg. 15375 (1979), conflicts with this court's order of August 21, 1979. In that opinion the court noted that hydrologic data no longer required a 12 month monitoring. Memorandum Opinion and Order, August 21, 1979, at 34. To the extent the regulation requires monitoring at the site of the AVF, the court must sustain Peabody's objection. We therefore remand 30 C.F.R. § 785.12(d)(2)(iii) & (iv) to make clear that "water quality analyses describing seasonal variations over at least one full year" need only require an analysis from data collected over a shorter period of time or extrapolations from existing data.

3. Small Acreage Exemption

Section 510(b)(5) of the Act, 30 U.S.C. § 1260(b)(5), enumerates two exclusions from the criteria for approval of mining operations on alluvial valley floors. The first allows mining when the regulatory authority finds that mining activities will interrupt "such small acreage as to be of negligible impact on the farm's agricultural production." The Secretary's test for the small acreage exemption is elucidated at 30 C.F.R. § 785.19(e)(2), 44 Fed. Reg. 15376 (1979):

> The effect of the proposed operations on farming will be concluded to be significant if they would remove from production, over the life of the mine, a proportion of the farm's production that would decrease the expected annual income from agricultural activities normally conducted at the farm.

The NCA alleges the regulatory provision emasculates the statutory exception; it effectively converts a small acreage exemption into a total bar of mining activities.

The court agrees with the NCA, and will order the remand of 30 C.F.R. § 785.19(e)(2). The clear language of the Act directs permit approval if the mining will interrupt only a small number of acres. Such mining activity would create a negligible impact on a farm's productive capacity. But the Secretary's definition would prohibit mining in this situation. Interference with a small number of acres may nonetheless result in a decrease of the farm's income. The Act intended the regulatory authority to grant a permit in this situation. Recognizing that the Act affords the Secretary discretion to define the exemption,[26] but mindful that the Secretary cannot stray from the intent of the Act, we remand 30 C.F.R. § 785.19(c). The court directs the Secretary to revise the regulation to allow mining on an AVF that results in a negligible impact on the farm's production.[27]

4. Damage to Hydrology

Section 510(b)(5)(B) requires that mining in an alluvial valley in the west "not materially damage the quantity or quality of water in surface or underground

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[26] "I doubt if there is any ambiguity [in the acreage exemption] that cannot be interpreted either by Secretarial regulation or by an appeal to an appropriate court." 123 Cong. Rec. S8039 (daily ed. May 19, 1977) (remarks of Sen. Metcalf).

[27] The legislative history supports this result. Senator Melcher, who sponsored the amendment that added Section 510(b)(5) of the Act, 30 U.S.C. § 1260(b)(5), stated that he envisioned 60 out of 1,000 acres as qualifying for the negligible impact exemption. 123 Cong. Rec. § 8144 (daily ed. May 20, 1977).

water systems that supply these valley floors in (A) of subsection (b)(5)." Part (A) of subsection (b)(5) contains an exemption for undeveloped range lands and for interruption of limited farmland acreage that constitutes a negligible impact on the farm's agricultural production. 30 C.F.R. § 785.19(e); 44 Fed. Reg. 15376 (1979), however, subjects undeveloped rangeland and small farm acreage to the hydrologic damage prohibition. Peabody argues that the hydrology requirement of Section 510(b)(5)(B) cannot apply to the statutory exemptions of Section 510(b)(5)(A).

The Secretary's attempt to extend the hydrology requirements to include the statutory exemptions of Section 510(b)(5) is inconsistent with the Act. Section 510(b)(5)(B) prohibits damage to water systems supplying AVF's "in (A) of subsection (b)(5)." The exclusion of negligible farm areas and undeveloped range lands, explicated in Section 510(b)(5)(A), therefore applies to the hydrology requirement of Section 510(b)(5)(B).

The legislative history confirms applying the exceptions of Section 510(b)(5)(A) to the requirements of Section 510(b)(5)(B). The Conference Committee Report states:

> Permit approval or denial must be based on a written finding by the regulatory authority that . . . the proposed surface mining operation, if located west of the 100th meridian west longitude would not interrupt, discontinue or prevent farming on alluvial valley floors of damage the quantity or quality of water in surface or underground water systems that serve the valley floor (unless the area is subject to one of the exceptions set forth in section 510(b)(5)).

H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 92 (1977). The parenthetical clause excludes the exceptions of Section 510(b)(5) from the consideration of whether min-

ing will conflict with hydrology requirements. We therefore remand 30 C.F.R. § 785.19(e)(l)(ii), and direct the Secretary to revise the regulation to allow negligible farmland interruption and undeveloped range lands as exclusions to the hydrology requirements of Section 510 (b)(5)(B) of the Act.[28]

VI. PERFORMANCE STANDARDS

1. Segregation of Subsoil

Section 515(b)(5) of the Act requires the removal and preservation of topsoil for reclamation purposes. This statutory section also requires the segregation of subsoil "if topsoil is of insufficient quantity or of poor quality for sustaining vegeation, or if other strata can be shown to be more suitable for vegetation requirements."

The Secretary implements the subsoil provision at 30 C.F.R. §§ 816.22(d) & 817.22(d) of the regulations. 44 Fed. Reg. 15397 and 15423 (1979). These regulations require segregation of the B and portions of the C horizons "if the regulatory authority determines that either of these is necessary or desirable to ensure soil productivity consistent with the approved postmining land use." The NCA objects to the regulations for expanding an allegedly narrow statutory exception into a broad one.

The NCA misinterprets the scope of 30 C.F.R. §§ 816.22 (d) and 817.22(d). Section 515(b)(5) authorizes segregation if the topsoil cannot sustain vegetation or if

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[28] The Secretary's attempt to justify the regulation on the basis of Sections 510(b)(3) and 515(b)(10)(F), 30 U.S.C. §§ 1260 (b)(3) and 1265(b)(10)(F), is unpersuasive. Section 510(b)(3) requires a regulatory authority to find that a mining operation not upset the hydrologic balance outside a permit area. Section 515(b)(10)(F) requires preservation of the hyrologic functions of alluvial valley floors. But Section 510(b)(5) clearly legislates an exception to these requirements for undeveloped rangelands and negligible impact on a farm's production.

other strata enhance post-mining revegetation. This is essentially what the regulations command. They focus on "soil productivity," and grant the regulatory authority power to require segregation if necessary to improve such productivity. 44 Fed. Reg. 15140 (1979). The Secretary's brief confirms this interpretation. It notes that the regulations command segregation "where the regulatory authority determines that these procedures would result in use of the best available soils materials to support revegetation." Brief at 215. The regulations therefore extend the segregation of subsoil provisions no father than the Act suggests.

2. Regulation of Explosives

The PCMA alleges that the Secretary lacks statutory authority to issue regulations with respect to explosives. The PCMA secondly argues that, if this court finds the SMCRA provides the Secretary with authority to issue regulations pursuant to explosives, the regulations promulgated, 30 C.F.R. §§ 816.61-67, are inconsistent with the Act. The court finds the Secretary has the authority to develop regulations with respect to explosives. We further find the specific regulations at issue are consistent with the Act.

The PCMA argues that Section 515(b)(15) of the Act, 30 U.S.C. § 1265(b)(15), is the only subsection of Section 515 wherein Congress employed the term "regulatory authority." [29] This allegedly implies that the states and not the Secretary possess the power to regulate explosives.

The court previously rejected a similar argument raised by the plaintiffs with respect to the permit and bonding regulations. Therein, the plaintiffs averred the

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[29] The lead in language of Section 515(b)(15) requires that explosives be used "only in accordance with existing State and Federal law and the regulations promulgated by the authority."

Act referred primarily to the "regulatory authority." We incorporate the same reasoning in upholding the Secretary's authority to promulgate regulations pursuant to explosives.

First, regulatory authority means the state regulatory authority only when the Secretary approves the state program. Section 701(22) of the Act, 30 U.S.C. § 1311 (22). But the Act defines a state program as "in record with the requirements of this Act and regulations issued by the Secretary pursuant to this Act . . ." Second, Section 201(c)(2) grants the Secretary authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of the Act." The Secretary's regulations at 30 C.F.R. §§ 816.61-67 relate to two purposes of the Act: protection against adverse effects of surface mining operations, Section 102 (a), and protection of the public interest. Section 102 (m). A court should sustain regulations when they reasonably relate to the purpose of the legislation. *Mourning* v. *Family Publication Service*, 411 U.S. 356, 372 (1973). Finally, Section 501(b) expressly empowers the Secretary to regulate "surface coal mining and reclamation operations performance standards . . ." Subsection 15 of Section 515 constitutes one such performance standard.

The PCMA believes the Secretary's regulations regarding explosives are inconsistent with the Act in that they set national standards instead of site-specific variances. The PCMA hinges its argument upon Section 515(d)(15)(C). This subsection requires blasting regulations to "limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical condition of the site . . ."

The Secretary's regulations, while establishing several uniform standards, nonetheless grant the state regulatory authority power to issue variances based on local conditions. Several examples suffice. 30 C.F.R. § 816.65(f)

prohibits blasting within 1,000 or 500 feet of certain structures [e]xcept where lesser distances are approved by the regulatory authority." 30 C.F.R. § 816.65(a) requires blasting between sunrise and sunset. Subsection (2) of that regulation nonetheless allows the state regulatory authority to deviate from this requirement in certain circumstances. Finally, 30 C.F.R. § 816.65(i) establishes a peak particle velocity standard. But the regulatory authority enjoys the discretion to reduce the standard based on "site specific" factors. These provisions demonstrate that the Secretary has promulgated national standards for explosives; however, they may be implemented and varied by the local regulatory authority in accordance with site specific conditions. The regulations are therefore consistent with the Act.

3. Control of Dams Impounding Waste

The NCA objects to the Secretary's regulations addressing dams impounding waste. 30 C.F.R. §§ 816.91-93 & 817.91-93, 44 Fed. Reg. 15409-10 & 15436-37. The NCA argues these regulations cannot be grounded in Section 515(b)(13) of the Act. 30 U.S.C. § 1265(b)(13). It notes this court previously held that Section 515(b)(13) calls for the regulation of dams constructed of waste materials but not for the regulation of dams impounding waste. *In Re Surface Mining Regulation Litigation*, 452 F.Supp. 327, 341 (D.D.C. 1978).

The NCA's assertion that thic court's prior ruling is res judicata with respect to the regulations at issue is incorrect. The court noted in its previous opinion:

> Because the regulation in question was not promulgated pursuant to Section 515(b)(10) the court will not decide the issue of the extent to which the Secretary may regulate dams impounding wastes under that section.

Id. at 341 n. 19. Upon review of Section 515(b)(10), the court now rules that the Secretary derives authority to regulate dams impounding waste pursuant to this section.

Section 515(b)(10) empowers the Secretary to minimize disturbances to the hydrologic balance at the minesite and associated offsite areas. This section specifically seeks the avoidance of toxic mine drainage by, inter alia: 1) preventing contact of water with toxic producing deposits, subsection (A)(i); and 2) preventing the contribution of suspended solids into streamflow. Subsection (B)(i). The regulations in question accomplish these objectives.

Slurry ponds[30] can cause water pollution when the suspended solids carry over into public streams. Wahler and Associates, *Pollution Control Guidelines for Coal Refuse Piles and Slurry Ponds* (1978) 80, Control No. 663.6, cited at 44 Fed. Reg. 15203 (1979). This water, at times, is acidic. *Id.* The stability of the retaining dam is the critical factor in preventing carry over. *Id.* When a dam fails, downstream pollution results. The regulations at issue thus seek to ensure the stability of dams or enbankments containing waste. Since one of the major purposes of these regulations is the protection of the hydrologic balance, Section 515(b)(10) authorizes their promulgation.

4. Cover of Hazardous Material

30 C.F.R. §§ 816.103(a) & 817.103(a)(1) require the mining operator to cover hazardous materials with a minimum of four feet of nontoxic, noncombustible material. The NCA objects to these regulations because they fail to allow the operator the option to treat the hazardous elements. The Heine affidavit, paragraph M, sus-

[30] Slurry ponds are caused by washing coal to remove impurities.

pends these regulations. *See* December 21, 1979 Order at 2.

5. Coal Operator's Use of Land After Reclamation

The Secretary's regulations require that an operator who proposes range or pasture land for post mining land use must actually use the land for grazing for the last two years of bond liability. 30 C.F.R. §§ 816.115 and 817.115, 44 Fed. Reg. 15413 and 15439 (1979). Similarly, 30 C.F.R. §§ 823.11(c), 823.15(b), and 823.15(c) require that prime farmlands within the permit area must actually support crops. The NCA argues the Secretary lacks a statutory basis to require actual grazing and mandatory crop production. It believes the Act only requires an operator to restore the land so that it is capable for use as pasture land or prime farmland.

The Secretary attempts to justify 30 C.F.R. §§ 816.115 and 817.115 on Section 515(b)(19) of the Act, 30 U.S.C. § 1265(b)(19). This attempt is unpersuasive. Section 515(b)(19) requires the operator to establish permanent vegetative cover, capable of revegetation, "at least equal in extent of cover to the natural vegetation of the area." This section simply commands the establishment of a permanent vegetative cover. It fails to imply that proposed post mining pasture or graze land must actually be subjected to grazing activities.

The House Committee Report supports this interpretation. It states that "[g]razing use of such lands during the period of operator responsibility is allowable . . ." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 109 (1977). By speaking permissively, rather than mandatorily, the House report suggests that grazing may be one method of demonstrating revegetation capability. But it certainly is not the only method, and it would be arbitrary and capricious to force coal operators to engage in this enterprise.

The court similarly finds the Act fails to provide statutory support for requiring coal operators to engage in farming. The Secretary cites Sections 515(b)(7), 510(d)(1), and 515(b)(20) of the Act. 30 U.S.C. §§ 1265(b)(7), 1260(d)(1), and 1265(b)(20). These statutory enactments do not command a coal operator to actually farm the land.[31] Instead, they direct the operator to demonstrate capability of prime farmlands to support pre-mining productivity. This capability can be demonstrated by a soil survey.

6. Period for Measuring Success

The NCA objects to regulations that delay triggering a coal operator's responsibility for successful revegetation until the vegetation reaches 90% of the natural cover in the area. 30 C.F.R. § 816.116(b), 44 Fed. Reg. 15413, 30 C.F.R. § 817.116(b), 44 Fed. Reg. 15439 (1979). Section 515(b)(20) of the Act, 30 U.S.C. § 1265(b)(20), requires coal operators to "assume responsibility for successful revegetation . . . for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work, in order to assume compliance with paragraph (19)."[32] The challenged regulations therefore delay counting the five year period until the coal operator meets the Secretary's standard for vegetative cover density.

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[31] Section 515(b)(7) establishes soil reclamation standards. Section 515(b)(20) requires successful revegetation cover. Section 510(d)(1) requires the operator, in his permit application, to demonstrate technological capability to restore the mined area to prime farmland. In addition, Section 519(c) requires that bond be withheld until the operator demonstrates "soil productivity for prime farm lands . . . as determined from the soil survey . . ."

[32] Section 515(b)(20) extends the period of responsibility to 10 years for lands where average annual precipitation is less than 26 inches per year.

The court agrees with the NCA that the regulations are without support in either the Act or the legislative history. Rather than extending liability from the point at which the coal operator meets the vegetative standards of Section 515(b)(19), the language of Section 515 (b)(20)[33] intends to impose liability for five years from the point at which the coal operator has completed seeding and fertilizing. This constitutes the middle, rather than the end of the process of meeting the 90% vegetation requirement of Section 515(b)(19).

The legislative history supports this interpretation. The House Committee Report, in deciding upon a five year liability period, noted that it takes, on the average, four years to reclaim mine sites. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 109 (1977). For areas where precipitation is less than 26 inches per year, the same report noted that "the length of time necessary to reestablish vegetation on mining spoil varies considerably . . . [and] ranges from 10 years upward. Thus a 10 year standard of the bill represents a minimum time under the most favorable circumstances." *Id.* The House focused not on attaching a 5 or 10 year liability period after successful revegetation occurs, but directed a 5 or 10 year period to enable the coal operator to achieve successful revegetation. The court therefore remands these regulations. We suggest that the 5 or 10 year liability period begin "after the last year of augmented seeding, fertilizing, [and] irrigation."

7. *Restoration of Previously Mined Land*

The NCA objects to 30 C.F.R. § 816.133(b)(1) and 817.133(b)(1), 44 Fed. Reg. 15415, 15441 (1979). These

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[33] Section 515(b)(20) contemplates triggering the time period "after the last year of augmented seeding, fertilizing, irrigation, or other work in order to assure compliance with paragraph (19) . . ."

regulations require that previously mined but unreclaimed land be restored to the "highest and best use . . . compatible with surrounding areas." The NCA, relying on Section 515(b)(2), believes an operating has an option to either: 1) restore land to its condition prior to the most recent mining; or 2) restore the land to a more useful condition. Hence, if an operator mines land previously mined but unrestored, the operator need only restore it to the state that existed before its most recent mining.

The NCA's interpretation of Section 515(b)(2) is without merit. That section requires the coal operator to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to *any* mining or higher or better uses of which there is reasonable likelihood . . ." The use of the word "any" indicates that Congress intended the operator to restore the land to the condition that existed before it was ever mined. Moreover, the language "capable of supporting" refers to the land's potential as a productive segment of the area.

The Senate Report supports this finding. It states:

> The description [of the land] must also include an evaluation of the capability of the site to support a variety of uses prior to any mining disturbances . . . It is important that the potential utility which the land had for a variety of uses be the benchmark rather than any single, possibly low value, use which by circumstances may have existed at the time mining began.

S. Rept. No. 95-128, 95th Cong., 1st Sess. 76-77 (1977). By referring to "potential utility", rather than to "low value", the Senate Report makes clear that restoration of previously mined land must be upgraded to support its utility for productvie use.

8. Leters of Commitment for Alternate Postmining Land Use

30 C.F.R. §§ 816.133(c) and 817.133(c), 44 Fed. Reg. 15416 and 15441 (1979), provide the conditions under which post-mining land use may differ from premining capability. The NCA objects to: 1) subsection (c)(4) of these regulations, requiring letters of commitment to accompany the permit application to demonstrate "that financing, attainment and maintenance of the postmining land use are feasible,"; and 2) subparagraph (c)(9)(1) that requires, for lands converted to crop production, a firm written commitment by the operator, landowner, or land manager "to provide sufficient crop management after release of applicable performance bonds . . . to assure that the proposed postmining cropland use remains practical and reasonable." The NCA believes that Section 515(b)(2), in addressing postmining land conversion from pre-mining uses, requires only a "reasonable likelihood" of alternate use that is higher or better than previous use. Legally binding commitment letters therefore exceed the statutory standards.

The court agrees with the NCA and will remand these regulations. The Act only requires an operator ot demonstrate a reasonable likelihood of sustaining higher or better use. Reasonable likelihood fails to imply "a letter of commitment" from third parties, subsection (c)(4) of the regulations, or "a firm written commitment", subsection (c)(9) of the regulations. Those regulatory commitments substantially exceed the dictates of the Act and are therefore inconsistent with the SMCRA.

9. Surface Owner Protection Against Subsidence

The NCA objects to 30 C.F.R. § 817.124, 44 Fed. Reg. 15440. This regulation requires a mining operator to correct or compensate a surface land owner for damages caused by subsidence. The regulation affords the

operator one of three alternatives: 1) restore the damaged structure and the land; 2) purchase the damaged structure and restore the land; or 3) compensate the owner and restore the land.

The NCA alleges this regulation is inconsistent with Section 507(f) of the Act, 30 U.S.C. § 1257(f). Section 507(f) requires a permit applicant to purchase liability insurance for personal and property damage caused by surface coal mining. The NCA believes the Act restricts the Secretary to the imposition of an insurance requirement with respect to subsidence damage.

Contrary to the allegation of the NCA, all three alternatives in 30 C.F.R. § 817.124 find support in the Act. The restoration alternative is consonant with Section 515(b)(2) of the Act, 30 U.S.C. § 1265(b)(2). This provision requires the coal operator to restore "the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining . . ." The purchase and dismantle alternative only effectuates the command of Section 517(f). That section requires the coal operator to insure the owner against property damage. The compensation alternative, similar to the second alternative, is also essentially an insurance mechanism authorized by Section 507(f).[34]

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[34] The NCA also alleges that the Secretary afforded an inadequate opportunity to comment on 30 C.F.R. § 817.124. It believes the Secretary failed to provide adequate notice and opportunity to comment, as required by 5 U.S.C. § 553. This objection is without merit.

Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, requires a final regulation to be within the scope of the notice of proposed rule. *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941. Herein, the prepublication draft of the regulation, noticed in the Federal Register on July 24, 1978, 44 Fed. Reg. 31954, required underground operators to provide a warrant guarantee against subsidence damage to surface

10. Buffer Zone for Underground Mining

The NCA attacks 30 C.F.R. § 817.126, 44 Fed. Reg. 15441 (1979). This regulation prohibits underground mining beneath or adjacent to streams, public buildings, and aquifers if such mining will cause material damage to these natural resources or buildings.

There is little question that 30 C.F.R. § 817.126 is authorized by several sections of the SMCRA. For example, Section 516(b)(1) of the Act, 30 U.S.C. § 1266(b)(1), directs the Secretary to "adopt measures . . . to prevent subsidence causing material damage . . ." Section 516(b)(9) of the Act, 30 U.S.C. § 1266(b)(9), authorizes the Secretary to minimize disturbances to the hydrologic balance. The prohibition of mining that threatens material damage to surface structures and water resources helps to implement these statutory commandments.[35]

VII. ENFORCEMENT

1. Warrantless Inspections

Virginia attacks two aspects of the Secretary's regulation governing warrantless inspections. 30 C.F.R. § 840.12, 44 Fed. Reg. 15456 (1979). It believes warrantless inspections cannot apply either to coal explora-

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structures. The preamble of the proposed rule, published on September 18, 1978, stated the drafters:

> considered and rejected alternative language which would have required the operator to assume liability for subsidence damage, purchase a non-cancellable property insurance policy in favor of the surface owner . . .

43 Fed. Reg. 41784 (1978). The prepublication draft and the preamble provided sufficient notice to alert the public that the regulation finally adopted was under consideration.

[35] The NCA also raises a taking issue with respect to this regulation. The court previously decided that constitutional question appurtenant to taking are premature.

tion operations or to unpermitted coal mining and reclamation operations. This court previously found permissible warrantless inspections in the permit area. *In Re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1317 (D.D.C. 1978). We likewise find warrantless inspections pursuant to exploration and unpermitted operations are consonant with the Act.

Virginia's attack on exploration searches relies on this court's previous opinion addressing the interim regulations. The court therein framed the issue of warrantless inspections as pertaining to "the permit area." *Id.* Because exploration removing less than 250 tons requires notice rather than a permit, Virginia believes a regulatory authority is without power to search non-permit exploration operations.

This interpretation of searches belies the purpose of the Act's enforcement provisions. Enforcement provisions, including searches, are designed to ensure compliance with the Act's performance standards. Section 512(a) of the Act, 30 U.S.C. § 1262(a), applies performance standards to coal exploration operations. Section 512(c) of the Act, 30 U.S.C. § 1262(c), directs the regulatory authority to enforce compliance with the performance standards against "any person." The enforcement mechanisms available for permitted and for exploration operations are thus identical. This court's prior ruling that warrantless inspections properly attach to permitted coal operations therefore mandates application of this valuable enforcement mechanism to exploration operations.

Virginia argues that warrantless inspection pursuant to unpermitted mining operations is inconsistent with this court's previous opinion and with the Act. However, anyone who mines without a permit, absent narrow exceptions, violates the SMCRA. Section 502 of the Act, 30 U.S.C. § 1252. Unpermitted mining operations that violate the Act are perhaps the most flagrant type

of violation. The regulatory authority must therefore enjoy the same eforcement mechanisms pursuant to violators with, and violators without, permits.[36]

2. State Court Trial De Novo

Virginia objects to the Secretary's statement in the preamble that discourages trial *de novo* following administrative hearings on penalties and sanctions. 44 Fed. Reg. 15296 (1979). It believes that Section 526(e) of the Act, 30 U.S.C. § 1276, directing "judicial review . . . in accordance with State law . . .", allows a state to determine the form of judicial review appurtenant to enforcement actions.

Section 526(b) of the Act, 30 U.S.C. § 1276(b), requires that judicial review of administrative enforcement proceedings be based "solely on the record." Because Section 521(d)[37] requires state program enforcement provisions "the same or similar" to the federal procedures, the language of Section 526(b) arguably prohibits *de novo* review.

The Secretary, however, has adopted a reasonable and flexible approach. According to the Secretary:

> If a State can demonstrate that its review procedures contain adequate safeguards to prevent the subversion of the enforcement program that seems likely to occur under trial *de novo*, while at the same time

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[36] The court reiterates the Secretary's representation that a warrant must be obtained before entering any building. *In Re Surface Mining Regulation Litigation*, 456 F.Supp. 1301, 1317 (D.D.C. 1978). This applies whether the mining area is permitted, a non-permit exploration area, or an unpermitted operation.

[37] The court has established that both phrases of the first sentence of Section 521(d) refer back to "enforcement provision." *See* opinion at I.C.4 (citizen access). The procedural requirement of *de novo* review thereby is encompassed by Section 521(d).

> allowing for such trials, then the Secretary would deem such procedures to be the 'same or similar' as the federal procedures within the meaning of Section 521(d). 30 U.S.C. 1271(d).

Brief at 304. This approach is consonant with the Act. The Act perceives judicial review as based on the record. If, however, a state can prescribe a trial *de novo* procedure that does not unduly interfere with expeditious review and other values attendant to the enforcement program, then the Secretary will allow the procedures.[38]

VIII. MISCELLANEOUS

1. Definition of Permittee

Virginia objects to the regulatory definition of the term "permittee." The regulation defines a permittee as "a person holding or required by the Act of Chapter VII to hold a permit to conduct surface coal mining and reclamation operations." 30 C.F.R. § 701.5, 44 Fed. Reg. 15320 (1979). Virginia argues this definition impermissibly expands the definition espoused in the Act, which defines permittee as "a person holding a permit." Section 701(8) of the Act, 30 U.S.C. § 1291(18).

This definition is consonant with the Act. The Act makes clear that "no person shall engage in . . . surface coal mining operations unless such person has first obtained a permit . . ." A permittee must obey the Act's performance standards on pain of assessment of civil penalties. In fact, Section 515(b) of the Act applies the

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[38] It appears that Virginia envisioned this posibility. Its legislature promulgated a provision for trial *de novo* review. But that statute provides:

> [I]n the event the jury trial *de novo* provision provided for herein is disapproved by the Secretary, such provision shall be severable from this act and shall be of no effect.

Section 45.1-251 of the Code of Virginia, cited in Brief at 26.

performance standards to "all surface coal mining and reclamation operations . . ." This definition fails to differentiate between permitted and unpermitted regulations. Therefore, the Secretary should be allowed to regulate unpermitted operations; such operations violate the Act and the Secretary is directed to apply the performance standards of the Act to such coal mining operations.

2. Variance Only For Steep Slopes

Section 515(b)(3) of the SMCRA requires each operator "to restore the approximate original contour of the land." Section 515(e) of the Act provides for a variance from this requirement. 30 C.F.R. § 785.16 implements the variance provision of Section 515(e). The regulation provides for variances from steep slopes; slopes exceeding 20 degrees. Peabody, believing the Act allows variances for slopes of all degrees, attacks 30 C.F.R. § 785.16 as unduly restricting the opportunity for obtaining a variance from the contour restoration requirement.

Peabody argues that the Act dictates two separate variance porvisions. According to Peabody, Section 515(e)(1) provides a general variance mechanism. Under this proviison, a permittee need only meet the requirement of Section 515(e)(3). Section 515(e)(2), under this scheme, establishes a separate variance procedure for steep slopes.

Peabody's reading of the statute is seriously in error. Section 515(e) of the Act contains one variance provision; it applies to steep slopes. Rather than calling for a general variance mechanism. Section 515(e)(1) establishes the right to apply for a variance. It directs the regulatory authority to "include procedures pursuant to which the regulatory authority may permit variances . . ." Section 515(e)(2) defines the scope of the variance provision and explicates the substantive criteria

a permittee applicant must demonstrate to the regulatory authority. Section 515(d)(2) restricts the variance application to the contour restoration requirement of subsection 515(d)(2) (steep slopes).

Whatever ambiguity may be read into Section 515 is dispelled upon examination of the legislative history. Senator Ford of Kentucky first introduced the concept of a variance mechanism. His proposal found its way into the statute at Section 515(e). He introduced his amendment to seek a variance procedure for the steep slopes of Kentucy and Appalachia.

The debate of the Ford amendment reveals that its chief concern was the attainment of an exception for Appalachian step slopes. *See* 123 Cong. Rec. S8097-8103 (daily ed. May 20, 1977). Senator Ford stated:

> The amendment speaks for itself. S.7 as written and reported, requires return to approximate original contour in every instance where mining is undertaken on slopes in excess of 20 degrees . . . My amendment proposes a variance procedure from this absolute requirement.

Id. at S.7867 (daily ed. May 19, 1977). The Conference Report buttresses this conclusion. It is in discussing steep slopes that the report reviews the Senate amendment seeking a variance from the original contour of steep slopes. H.R. Rep. 95-493 at 108.

An appropriate judgment accompanies this Memorandum.

JUDGMENT

This matter came before the court on cross-motion for summary judgment. Upon review of the memoranda submitted in this matter, the applicable law, and the arguments offered at oral hearing, it is, by the court, this 26th day of February, 1980,

ORDERED that the following regulations be remanded to the Secretary for revision in accordance with the foregoing Memorandum: 30 C.F.R. §§ 732.15(b)(7), 840.13(a), 761.5(a)(2)(i), 701.5 (mine plan area), 779.20, 780.16, 779.21, 783.21, 807.11(e), 808.14(b), 785.19(d)(2)(iii) & (iv), 785.19(e)(2), 785.19(e)(1)(ii), 816.115, 817.115, 823.11(c), 823.15(b), 823.15(c), 816.116(b), 817.116(b), 816.133(c), and 817.133(c); and it is further

ORDERED that the term "mine plan area," found at 30 C.F.R. §§ 779, 780, 783, and 784, be suspended; and it is further

ORDERED, ADJUDGED and DECREED that the defendant be granted summary judgment with respect to all other matters considered in the foregoing Memorandum.

APPENDIX E

U.S. COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 79-2073

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION,
PEABODY COAL COMPANY,
NATIONAL COAL ASSOCIATION, and
AMERICAN MINING CONGRESS,
Appellants

No. 79-1144

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION,
PENNSYLVANIA COAL MINING ASSOCIATION,
KERRY COAL COMPANY,
SUNBEAM COAL COMPANY, and
WEST FREEDOM MINING CORPORATION,
Appellants

January 18, 1980

FULL TEXT OF OPINION

Before TAMM and MacKINNON, *Circuit Judges*, and HAROLD GREENE,* *U.S. District Judge* for the District of Columbia.

Opinion *per curiam.*

PER CURIAM: This case comes to us on appeal from an order entered by Judge Thomas A. Flannery of the United States District Court for the District of Columbia that denied the appellants' request for a preliminary injunction [13 ERC 1586]. Specifically, the appellants,

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

several coal-mining firms, asked that the court block implementation of regulations promulgated by the Secretary of the Interior under the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C.A. §§ 1201-1328 (West Supp. 1979), insofar as they specify minimum requirements for information that state regulatory authorities must obtain in their regulation of the coal-mining industry. We affirm.

The Act provides a truly federalist distribution of regulatory authority for the coal-mining industry. After a transition period of direct regulation under the Secretary of the Interior, each state in which coal is mined has the option of submitting to the Secretary its own program for surpervising mining and reclamation within its borders. Act § 503, 30 U.S.C.A. § 1253. The Secretary, after following certain procedures, must approve the program if he finds it adequate to protect environmental concerns that lay behind the adoption of the Act. Once its plan is approved, the state assumes responsibility for enforcing the Act. *Id.* If a state fails to submit a satisfactory program, or if it does not wish to assume jurisdiction over mining within its borders, the Secretary must devise a program for that state suited to its particular needs. *Id.* § 504(a), 30 U.S.C.A. § 1254(a). Whether regulation is in federal or state hands, a firm wishing to engage in surface mining must obtain a permit from the regulatory authority before it may begin or continue its operations. *Id.* § 506(a), 30 U.S.C.A. § 1256(a). The Act spells out in detail the minimum information that an applicant must submit to the regulatory authority to accompany its permit request. *See id.* § 507(b), 30 U.S.C.A. § 1257(b).

On March 13, 1979, the Secretary issued 150 pages of regulations that establish a permanent regulatory regime, including minimum standards that state programs must meet to obtain his approval. *See* 44 Fed.

Reg. 14,902, 15,312-463 (1979) (to be codified at 30 C.F.R. §§ 700-890). States may deviate from these regulations and still receive the Secretary's approval only under certain conditions. *See id.* at 15,324 (to be codified at 30 C.F.R. § 731.13).

Various mining states and firms filed a total of nine actions challenging most asspects of the regulations. Proceedings were consolidated before Judge Flannery. Several industry plaintiffs also sought a preliminary injunction to halt implementation of the parts of the regulations that specify the minimum information states must require in permit applications. *See id.* at 15,353-70 (to be codified at 30 C.F.R. §§ 778-780, 782-784). These parties contend primarily that the Secretary lacks the authority to compel states to demand this information because, they believe, the Act gives the states latitude to establish for themselves what information they will require under their own permit programs, subject to the general provisions of section 507(b). These parties argue that compliance with these regulations, even pending resolution of this litigation, is excessively burdensome and will harm them irreparably.

This circuit's standard for granting preliminary injunctions is clear. It requires the district judge to evaluate four factors: the likelihood that the party requesting the injunction will prevail on the merits, the possibility that he will suffer irreparable injury without interim relief, the harm caused to others by granting the injunction, and the public interest. *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Whether to grant interim relief nevertheless remains within the discretion of the trial judge, and an appellate court will reverse his decision only for an abuse of that discretion. *Deckert* v. *Independence Shares Corp.*,

311 U.S. 282, 290 (1940) (quoting *Prendergast* v. *New York Telephone Co.*, 262 U.S. 43, 50-51 (1923)); *Delaware & Hudson Railway* v. *United Transportation Union*, 450 F.2d 603, 619 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971). In the case before us, Judge Flannery examined all the factors described in our prior decisions and concluded that a preliminary injunction would not be appropriate. We do not believe that in doing so he abused his discretion. Therefore, we affirm his order denying interim relief.

In reaching our decision, we intimate no view on the merits of the appellants' arguments. Nevertheless, because those arguments are substantial, because complying with the regulations, even temporarily, imposes a heavy burden on the appellants, and because the Act sets severe limitations on the time for promulgating regulations, we urge Judge Flannery to consider these issues carefully and to reach a decision expeditiously, as he indicated he would when he set the hearing on the merits for "mid-January 1980." *In re Permanent Surface Mining Regulation Litigation*, Civ. No. 79-1144, at 3 (D.D.C. Aug. 21, 1979) (memorandum opinion), *reprinted in* Joint Appendix at 1, 3.

Affirmed.

APPENDIX F

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

No. 79-1144

(Master file, Consolidated)

IN RE: PERMANENT SURFACE MINING
REGULATION LITIGATION

August 21, 1979

MEMORANDUM OPINION

The case before the court involves numerous challenges to the validity of the Secretary of the Interior's regulations setting standards for permanent programs regulating the surface mining of coal in the United States. At this stage of the proceedings, the court has before it six motions for preliminary injunctive relief and a discovery motion. At the hearing on these motions on July 25, 1979, the court granted motions filed by the State of Illinois and the Commonwealth of Virginia to enjoin the requirement that they submit draft programs for surface mining within their borders by August 3, 1979. The reasons for the grant of injunctive relief were set forth briefly in an order granting the preliminary injunction and will be discussed more fully in this Memorandum Opinion. The court will deny the industry motions for preliminary relief, will deny most of the environmental plaintiffs' discovery requests, and will enter summary judgment for the defendant on the public participation and *ex parte* contacts issues.

I.

BACKGROUND AND STANDARD OF REVIEW

The Surface Mining Control and Reclamation Act of 1977 was enacted by Congress on August 3, 1977. It

established a two-tier regulatory program designed to allow the mining of coal while protecting the environment from the damaging effects of surface mining. The first "tier" of the program was an interim regulatory program which became effective in early 1978. 30 U.S.C.A. §§ 501-02 (Supp. 1978); *In Re Surface Mining Regulation Litigation*, 452 F.Supp. 327, 331 [11 ERC 1593] (D.D.C. 1978). The interim regulations were reviewed by this court and certain aspects of that case are now on appeal.

During the pendency of the interim program, the Secretary's Office of Surface Mining ("OSM") was required to promulgate permanent regulations by August 3, 1978. 30 U.S.C.A. § 501(b) (Supp. 1978). The final regulations, however, were not published until March 13, 1979. They consist of approximately 150 pages of regulations [1] and 400 pages of explanatory comment.[2] The regulations are designed to provide the basis for a comprehensive program for surface mining, which will be implemented either by the states, if they submit a plan acceptable to OSM,[3] or by the Secretary if they do not.[4]

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[1] 44 Fed. Reg. 15312-15463 (1979).

[2] *Id.* 14902-15309 (1979).

[3] 30 U.S.C.A. § 503 (Supp. 1978). The state must submit a plan demonstrating that it has the ability to carry out the provisions of the Act. *Id.* Among the numerous other statutory requirements, the state must promulgate "rules and regulations consistent with the regulations issued by the Secretary pursuant to this Act." *Id.* § 503(a)(7). This means that the state must implement the proposed regulations currently before the court, which the Secretary views as the minimum standards for state programs, unless the state suggests "alternatives" that are responsive to local conditions, but still consistent with the Act. 30 C.F.R. § 731.13 (1979).

[4] 30 U.S.C.A. § 504 (Supp. 1978). The Secretary is empowered to establish a federal program if a state fails to submit a program acceptable to the Secretary or fails to implement or en-

After the regulations were promulgated, the various parties to this action filed nine separate complaints attacking numerous aspects of the regulations. The court ordered that the case be consolidated and set up a three-stage briefing schedule. The present dispute concerns the need for preliminary relief pending the court's consideration of the many challenges to the regulations on the merits. After the resolution of these issues, the parties will brief approximately half of the roughly 100 specific challenges to the regulations for a hearing in mid-November, and will brief the remaining issues for a hearing in mid-January 1980.

Six plaintiffs or groups of plaintiffs have filed motions for preliminary relief. The State of Illinois and the Commonwealth of Virginia requested the court to enjoin the application of the August 3, 1979 deadline for submission of state programs, alleging that they had insufficient time to prepare the programs because of the Secretary's delay in promulgating the regulations, and contending that the denial of relief would cause them irreparable harm. The court granted this request.[5] The environmental plaintiffs jointly challenge the Secretary's failure to promulgate detailed regulations for public participation in the preparation of State programs. They also seek to enjoin "unlawful *ex parte* contracts" between state and federal officials during the preparation of state programs. Finally, the environmental plaintiffs

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force an approved program. *Id.* The federal program if a state fails to submit a program acceptable to the Secretary or fails to implement or enmentation of a federal program, although the federal program will remain in effect until a satisfactory state program is formulated. *Id.* § 504(e).

[5] The Commonwealth of Virginia also moved to stay this case pending the resolution of a case in Virginia challenging the constitutionality of the Act. This motion was withdrawn at the July 25, 1979 hearing after the court ruled from the bench on the August 3 deadline issue.

have initiated discovery regarding alleged *ex parte* contacts between the President's Council of Economic Advisors ("CEA") and the Office of Surface Mining after the close of the comment period for the permanent regulations. The Secretary opposed the discovery requests and the parties briefed this issue pursuant to a court-approved schedule for decision at this time.

Three of the industry plaintiffs attack the permit requirement regulations promulgated by the Secretary pursuant to Sections 506-508 of the Act, 30 U.S.C.A. §§ 1256-58 (Supp. 1978). The Peabody Coal Company ("Peabody") contends that the "cumulative burden" of the permit regulations is so great that the industry will be irreparably harmed by compliance and that the two months allotted for the preparation of "complete" permit applications are patently insufficient. A group of plaintiffs led by the Pennsylvania Coal Mining Association (the "Pennsylvania plaintiffs") join in the Peabody motion, but also stress the allegedly destructive impact of the permit requirements on small operators in the State of Pennsylvania. Finally, the National Coal Association and the American Mining Congress ("NCA/AMC") challenge the basis and purpose statement accompanying the permit regulations, alleging that it dealt inadequately with the financial and time constraint impacts on the industry.

After consideration of the various motions and the oppositions filed by the Secretary, the court will (1) allow the injunction issued on July 25 to remain in effect; (2) deny the environmental plaintiffs' motions, except to allow limited discovery; and (3) deny the industry plaintiffs' requests for preliminary relief.

In considering the motions for preliminary relief, the court bears in mind two aspects of the applicable standard of review. Section 526 of the Act provides that the rules promulgated by the Secretary shall not be set aside

unless they are determined to be "arbitrary, capricious, or otherwise inconsistent with law." 30 U.S.C. § 1276(a)(1) (Supp. 1978). In addition, the present posture of the case, the moving parties must demonstrate the likelihood of success on the merits and the possibility of irreparable harm to them if injunctive relief is not granted. They must also show that the harm to them if injunctive relief is not granted. They must also show that the harm to the Secretary or to third parties, or the public interest does not compel the denial of interim relief. *Washington Metropolitan Area Transit Authority* v. *Holiday Tours*, 559 F.2d 871 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). Thus, the plaintiffs must demonstrate the likelihood that they will show that the Secretary has acted arbitrarily or capriciously to prevail on their motions for injunctive relief.[6]

II.

Commonwealth of Virginia and State of Illinois—Motion to Enjoin the Implementation of the August 3, 1979 Deadline For Submission of Proposed State Programs.

The Commonwealth of Virginia and the State of Illinois challenge the implementation of a statutory deadline in the Act that would require them to submit proposed state programs for the implementation of the Act by August 3, 1979. Section 503(a) of the Act, 30 U.S.C.A. § 1253(a) (Supp. 1978), requires states that

[6] In the Order consolidating this action, the court indicated that it would consider converting the motions for preliminary relief into motions for summary judgment if it considered the merits sufficiently briefed and perceived no genuine disputes as to any material facts. In such circumstances, of course, the *Virginia Petroleum Jobbers* criteria need not be considered. The court has exercised this opinion only with respect to the issues raised by the environmental plaintiffs.

wish to assume exclusive jurisdiction over the regulation of surface coal mining to submit to the Secretary a plan within eighteen months after the enactment of the Act. The Act became effective on August 3, 1977. A separate provision of the Act allows the Secretary to extend the submission date by an additional six months if the implementation of a state program would require action by the state legislature. *Id.* § 1254(a). The Secretary, during the course of promulgating the final regulations, determined that every state subject to the Act would require legislative action, and exercised his extension authority. 30 C.F.R. § 731.12, 44 Fed. Reg. 14951, 15324 (1979). Thus, under the terms of the final regulations, the states must submit plans by August 3, 1979.

The gist of the challenge to the August 3 deadline is that the Secretary failed to meet his own deadlines required by the Act. The Act directed the Secretary to promulgate final regulations covering a permanent regulatory program for surface coal mining within one year of the effective date of the Act. 30 U.S.C.A. § 1251(b) (Supp. 1978). Thus, the regulations were to be promulgated by August 3, 1978. They were not actually released in final form until March 13, 1979. This would give the states, if they were to meet the August 3, 1979 deadline, about four-and-one-half months to review the final regulations, prepare their own plans, secure appropriate legislation, and present the plans to the Secretary for approval. The Secretary clearly expected, when promulgating the final regulations, that the States would be required to meet the August 3 deadlines. 30 C.F.R. § 731.12.

After the promulgation of the regulations, the states voiced vociferous objection to the short time allowed for preparation of state plans, and indicated at the outset of proceedings before this court that they would challenge the August 3 deadline. On June 25, 1979, Senator

Jackson, at the Administration's request, introduced legislation in the Senate (S. 1403) that would provide an extension of seven months of all deadlines contained in the Act for the submission of state programs or the implementation of a federal program. At the same time, the Secretary moved to provide some relief to the states by requesting an opinion from the Solicitor of the Department of the Interior on his authority to grant further extensions of time for the submission of state programs. The Solicitor concluded that, although the August 3, 1979 deadline was directory in nature and could be extended, the June 3, 1980 deadline for implementation of a permanent program required by Section 504(a) of the Act, 30 U.S.C.A. § 1254(a) (Supp. 1978), was mandatory and could not be extended by action of the Secretary. *Solicitor's Memorandum* of July 2, 1979, at 19. The Secretary therefore resisted an attempt by the State of Illinois to secure an expedited hearing on its motion for preliminary relief by representing that Congress would take action soon, and if Congress did not act, the Secretary unilaterally would extend the August 3 deadline. On the basis of this representation, and in the belief that Congressional action would be more appropriate than judicial intervention, the court denied Illinois' motion for an expedited hearing.

As of the date of the hearing in this matter, however, Congress had not enacted an extension of time. The Secretary nonetheless maintained that the entire issue was moot, because the Secretary had promised to grant an extension, although "[t]he exact extent and manner of an extension by executive action is still under consideration." At the hearing on July 25, the Secretary represented to the court that he was prepared to sign a proposed regulation that would enable the States to extend their time for submission up to 60 days on a case-by-case basis. The regulation would provide that the submission date could be extended only on a showing by the

state that the delay was justified, after an application for an extension, with the final decision to rest in the hands of the Secretary.

At the hearing, the court held that Illinois and Virginia had demonstrated a likelihood that the retention of the August 3 deadline would be arbitrary and capricious, and that the proposed, qualified sixty-day extension did not change this conclusion. The following shall constitute the court's findings regarding the propriety of injunctive relief.

Likelihood of Success on the Merits

The parties all agree that the August 3, 1979 deadline is "directory" in nature. The court also concludes that this deadline was intended to provide the Secretary and the states with goals, rather than absolute timetables that carry a penalty for non-compliance. *Compare Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 193-95 [11 ERC 1705] (1978) with *Ralpho* v. *Bell*, 569 F.2d 607, 627-28 (D.C. Cir. 1977), *rehearing denied*, 569 F.2d 636 (per curiam). The twelve-month and eighteen-month timetables provided a guide for the conduct of orderly procedures in developing and implementing a comprehensive set of regulations governing the surface mining of coal. The Solicitor of the Department of the Interior concluded, however, that the June 3, 1980 deadline is mandatory in nature and may not be extended by the Secretary. This result, according to the Solicitor, is compelled by an examination of the consequences of a failure to meet that deadline. These are that (1) the Secretary must promulgate and implement a permanent regulatory program by June 3, 1980, if a state program has not been approved or is not being enforced; (2) citizen participation and bonding requirements will not become fully effective until a permanent program is in

effect; and (3) the protection of the environment contemplated by the Act will not be fully available until the permanent program is in effect. *Solicitor's Memorandum*, at 7-8.

The court need not resolve the question whether the June 3, 1980 deadline is mandatory at this time, because the injunction issued by the court does not apply directly to the June 3 deadline and because the court concludes that, even if the June 3 deadline is mandatory, the states nevertheless are entitled to relief.

The court is presented, therefore, with a situation in which all parties agree that the August 3 deadline is directory and should be extended, but in which the Secretary will not grant the states an extension of seven months so that they will have the full twelve months provided for by the Act. It may be that the full one-year period is "directory" and could, in certain circumstances, be adjusted by a small amount. On the facts of this case, however, the court concludes that the four and one-half months left to the states are patently insufficient, and that the possibility of a two-month extension, even if it were to be granted, does not ease the time constraints felt by the states. Consequently, the Virginia and Illinois motions are not moot, and the states are likely to prevail on the merits of their request.

Irreparable Harm to the States

The states will suffer irreparable harm if they are not afforded relief on their request for additional time to prepare proposed programs. The Act requires them to submit a plan for approval by the Secretary. If the Secretary finds the plan unacceptable, and the state cannot revise it to the Secretary's satisfaction, the Federal government will assume jurisdiction over surface coal mining in the state. Congress recognized that this was an undesirable, but possibly necessary step. See 30

U.S.C.A. § 1201(f) (Supp. 1978) (because of diversity in physical conditions, primary responsibility for regulating operations "should rest with the States"); *id.* § 1202(g) (purpose of the Act is to assist the states in developing and implementing a program to achieve purposes of Act); *id.* § 1211(c)(9) (OSM to assist states in meeting requirements of act with programs that reflect local conditions). The Senate Committee on Energy and Natural Resources, in its Committee Report on the final version of the Act, stated that:

> The assumption of regulatory authority over surface mining operations in any State by the Secretary through promulgation of a Federal program for that State is regarded by the Committee as a "last resort" measure. . . . It is certainly preferable that the State regulate such operations through State programs which meet the requirements of the Act. The Committee hopes and expects that the States, in good faith, will develop and implement strong State programs. However, if they fail to do so, the purpose of the Act and this section in particular is to insure that the full reach of the Federal constitutional powers will be exercised to achieve the purpose of the Act. S. Rep. No. 128, 95th Cong. 1st Sess. 73 (1977). The Secretary also recognizes that the implementation of a federal program is a "serious consequence" for a state that lacks an adequate plan. *Solicitor's Memorandum, supra,* at 7. The promulgation of a Federal plan totally deprives the state for an indefinite time of the ability to regulate coal mining on either private or federal lands within its boundaries, and the Secretary becomes the exclusive regulatory authority. *Id.; see* 30 U.S.C.A. § 504 (a) (Supp. 1978). The Secretary would assume ongoing control over all aspects of surface mining in the state, an event that Illinois characterizes as

> "usurpation of states' rights to regulate surface and underground coal mining through its police power," *Illinois Memorandum*, at 1, and which the various states have challenged in legal actions as violations of the Commerce Clause and of the Tenth Amendment. *Defendants' Memorandum*, at 15-16 and note.

In the absence of relief from the court, the states, in trying to meet the August 3 deadline or an unspecified extension of up to two months, will suffer immediate serious harm in a number of ways. The Commonwealth of Virginia, for example, indicates that the Virginia General Assembly attempted to pass adequate enabling legislation in early 1979, but was hindered by the absence of final regulations, which should have been published by then. The Assembly will not meet again until early 1980 and therefore enabling legislation cannot be passed until then. Griles Aff, ¶ 5. The rust to complete the plan by August 3, 1979 has resulted in considerable expense for consultants, attorneys, and staff, although it appears that some of this cost may be defrayed by federal grants. *Id.* ¶ 6, *see* Defendant's Memorandum, at 13. Public hearings have been held or were to be held, but the confusion resulting from the late promulgation of the regulations and uncertainty over judicial challenges has prevented meaningful comment. Griles Aff. ¶ 7. Mr. Griles further stated, in an affidavit prepared in June, 1979:

> 8. In July, 1979, The Board of Conservation and Economic Development will consider the proposed program after the public comment period closes. It as well as its staff, of which I am a principal member, will face the same dilemma and quandry, knowing that any action taken will later be changed or repeated. Regulations adopted under these conditions will have little meaning and, as stated, will not really be regulations at all. As a government official

and public servant, I feel that such events will harm the whole regulatory process and the psychological disorientation caused thereby will spill over into other similar activities, as well as causing serious administrative problems for the Department.

The State of Illinois, by affidavit of Douglas Downing, Supervisor of the Land Reclamation Division of the Illinois Department of Mines and Minerals, has provided the court with a lengthy affidavit describing the harm that will flow from the August 3, 1979 deadline, and providing as attachments the views of numerous governors of the various states. Their views and protestations are contained in the record and need not be set forth at great length, but they reflect a unanimous view that (1) the severe burdens imposed by an overly short deadline will require considerable wasted time, expense and manpower on work that undoubtedly will have to be done over again; (2) the press of work done in attempting to meet the August 3 deadline precludes the development and submission of serious alternatives to the federal program, as contemplated by the Act; and (3) public participation is restricted by the lack of time for deliberate review of the proposed program.

In view of the compelling showing by the Commonwealth of Virginia and the State of Illinois, it is apparent that the states will suffer irreparable harm by the imposition of the August 3 deadline. It is also evident that the states need the full year contemplated by Congress to prepare an adequate program, and that the Secretary's promise of "appropriate" time provides only the illusion of relief.

Harm to Other Parties if the Injunction is Granted

The Secretary and the OSM will be hindered in their attempts to review state submissions by the grant of an injunction. The Act contemplates review at two levels

of OSM, the concurrence of other federal agencies, public comment, and an opportunity for the states to revise their plans. See U.S.C.A. § 503 (Supp. 1978). The grant of an injunction could impair the agency's ability adequately to evaluate state plans.

A number of factors, however, considerably mitigate possible harm to the Secretary caused by a grant of interlocutory relief. First, any harm that will come to the Secretary is the direct result of the Secretary's own delay in promulgating final regulations for use by the states in drafting their plans. The court sees no reason to place the burden resulting from the Secretary's delay on the states. Second, the Secretary appears to be proceeding vigorously in seeking relief from Congress by way of a seven-month extension of the June 30, 1980 deadline. Given the apparent agreement by all concerned that some form of relief is required, it is probable that Congress will, in the near future, grant the requested extension.[7] Balancing this possibility against the immediate harm to the states, the court concludes that any prospective harm to the Secretary fails to overcome the states' need for immediate relief.

The Public Interest

The public has an interest in the orderly promulgation of comprehensive programs for surface mining and recla-

[7] Counsel for the Secretary indicated at the July 25 hearing that the proposed extension of time was reported out of Committee with additional substantive amendments to the Act. These amendments apparently have the effect of lowering standards for the permit application process. The Secretary indicated that these amendments were totally unacceptable. Whether or not the substantive amendments remain in S. 1403, the court's function is merely to evaluate the possibility that the June 3, 1980 deadline will be extended. The substantive amendments, which apparently would limit the scope of the Secretary's power to regulate the permit process, are irrelevant to the present motions for injunctive relief.

mation that reflect the congressional goals of protection of the environment, adequate levels of coal production, and the opportunity for states to develop alternatives to the federal program that reflect their local conditions. The court concludes that additional time is required for the states to develop programs, particularly in view of their need to develop reasoned alternatives to portions of the federal program. The environmental protection under the interim regulations are less comprehensive than they would be under the final regulations, but no one would contend that they are wholly inadequate. The court considers the public interest in reasoned consideration of the plans important in avoiding the waste of effort and funds, and consequent public disillusionment, that will accompany a headlong rush to complete the plans in an inadequate time. The court also believes that it is in the public interest to provide some relief from the states in the interest of federal-state relationships.

The injunction granted on July 25 shall remain in effect as provided in the injunction.

III.

National Wildlife Federation: Challenges to Public Participation Provisions and Alleged Ex Parte Contacts.

The environmental plaintiffs focus their request for preliminary relief on the public participation portions of the state program approval process and on alleged "*ex parte*" contacts between state officials and the Department of the Interior in which state surface mining and reclamation programs are discussed. On the public participation issue, the environmental plaintiffs allege that, unless the court so orders, the "[d]efendant will not promulgate regulations establishing the procedures and

requirements for public participation in the development of State regulatory programs under the Act. States are not making and will not make adequate provision for such public participation without specific and binding regulations." NWF Motion, p. 2.[8] On the *ex parte* issue, the environmental plaintiffs allege that "[u]nless restrained by this Court, Defendant will continue to engage in secret ex parte contacts with State officials to discuss the substance of State regulatory programs submitted or to be submitted to Defendant under the Act . . . ." *Id.* The court considers these issues sufficiently clear to permit a ruling on the merits. *See* Fed. R. Civ. Pro. 65 (a)(2). Summary judgment will be entered for the Secretary on these issues.

A. Public Participation

The environmental plaintiffs challenge the Secretary's refusal to establish detailed requirements for citizen participation in the development of state surface mining programs as inconsistent with the Act and arbitrary and capricious. The Act is structured to allow states in which surface mining operations are conducted to regulate such operations by developing and submitting to the OSM a program that comports with the Act and meets the approval of the Secretary. The only explicit congressional requirement for approval of state programs that involves citizen participation is that the Secretary hold at least one public hearing on the program within the state prior to approval. 30 U.S.C.A. § 1253(b)(3) (Supp. 1978). The Secretary nonetheless promulgated regulations requiring citizen participation pursuant to a general statutory power to establish procedures for the preparation, submission, and approval of state programs. *Id.* § 1251(b). These requirements are, first, that the application for program approval contain, *inter alia*,

[8] The State of Illinois joins in this aspect of the challenge.

"[n]arrative descriptions, flow charts or other appropriate documents:"

> (14) Providing for public participation in the *development* revision and enforcement of State regulations, the State program, and permits under the State program.

30 C.F.R. § 731.15(g)(14), 44 Fed. Reg. 15325 (1979) emphasis added). Second, the Secretary will not approve a program unless he finds that it

> (10) Provide[s] for public participation in the *development*, revision and enforcement of State regulations and the State program, consistent with public participation requirements of the Act and this Chapter.

Id. § 732.15(10), 44 Fed. Reg. 15327 (1979) (emphasis added). The Secretary maintains that this structure, which places upon the states the onus of developing citizen participation plans, gives the Office of Surface Mining flexibility in working with the states and gives the states flexibility in selecting methods best suited to their individual conditions. 44 Fed. Reg. 14965 (1979). Rather than mandate a certain procedure, the Secretary has included the above general conditions in the approval process and has sent a letter to the head of the regulatory authority in each coal-mining state bringing the citizen participation requirement to the state's attention. *See* Def. Ex. A.

The plaintiffs assail the general requirements as "legally and practically inadequate" to assure citizen participation. They point to Section 102(i) of the Act as requiring public participation in the preparation or development of a State program. That Section indicates that it is the purpose of Congress to

> (i) assure that appropriate procedures are provided for the public participation in the development,

> revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this chapter.

30 U.S.C.A. § 1202(i) (Supp. 1978). The plaintiffs contend that allowing the states to develop their own participation requirements, subject to after-the-fact review by the Secretary, cannot amount to "appropriate" procedures for public participation. NWF Memorandum p. 6; *see* 30 U.S.C.A. § 1251(b) (Supp. 1978); *id.* § 1202(i).

The environmental plaintiffs cannot succeed on the merits of this claim. The language they cite from the Act demonstrates a strong congressional intent that citizens be allowed to participate in all aspects of the regulation of surface mining, but does not explicitly require the Secretary to promulgate regulations directing the *form* of participation in the development of state plans. It is evident from the statute, the regulations, and the record in this case that citizens have been actively involved in the promulgation of regulations by the OSM that will guide the states in preparing their own plans. Citizens also will have an active role in numerous aspects of the ongoing regulatory scheme, including the approval by the Secretary of the state plan. The position taken by the Secretary is not that citizens are barred from the program development process at the state level; rather, it is that the Secretary has required this participation without specifying precisely the form it must take. The court sees nothing in the Act that would mandate this type of regulation.

In the absence of a specific directive from Congress, the court agrees with the defendant that the Secretary has considerable discretion in implementing the general statutory directive to ensure public participation. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-03 (1946). The Secretary has chosen to ensure citizen participation

in the development process by allowing the states to develop their own schemes and by conditioning approval of the plan on adequate participation. This procedure is within the Secretary's authority and is not an abuse of discretion.

The State of Illinois would like more guidance on the type of procedures acceptable to the Secretary, and joins the environmental plaintiffs, arguing that guidance from the Secretary would avoid the possibility of after-the-face rejection due to inadequate participation. It may be true that reviewing citizen participation levels after the submission of a program is less efficient than setting forth general guidelines for such participation. Nonetheless, the court's role in reviewing this decision is to determine whether such procedures are mandated by the Act, not to "stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 [11 ERC 1439] (1978).

Finally, the plaintiffs' reliance on *Citizens for a Better Environment* v. *EPA*, No. 78-1042 [12 ERC 1657] (7th Cir. January 26, 1979), 9 Env. L. Rep. 20092, is misplaced. That case arose under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, which contains an explicit provision compelling the Administrator of the EPA to "develop and publish" regulations containing guidelines for public participation in, inter alia, "the development . . ." of plans or programs under the Act. *See id.* § 1251(e). Moreover, the court in that case relied upon legislative history indicating a congressional desire that the EPA direct the form of participation in the development in state programs. Slip op., at 6. In the present case, the court finds no such explicit statutory duty, and the environmental plaintiffs have not pointed

to any legislative history that would disturb this conclusion.

Summary judgment on this issue will be entered for the defendants.

B. Ex Parte *Contacts Between State and Federal Officials*

The environmental plaintiffs take the position that the Secretary is effectively foreclosing citizen participation in the program approval process by refusing to bar *ex parte* communications between Department of the Interior officials and state officials. They contend that the process by which a state program is developed, refined, and presented to the Secretary amounts to an informal rulemaking, so that the traditional rulemaking restriction on *ex parte* contacts should apply.[9] In support of their position, the environmental plaintiffs have marshalled three arguments. First, they maintain that the approval-disapproval process is a rulemaking proceeding. Second, they contend that, even if the process is not a

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[9] The environmental plaintiffs moderated their position at the July 25 hearing. They indicated that they need not attend each and every meeting between state and federal officials, only those in which substantive (as opposed to informational) matters were discussed. Moreover, they represented to the court that they did not even desire to participate in the meetings, merely to observe. They asked the court to order the Secretary to publish a notice in the *Federal Register* ,whenever meetings of substance were about to occur, so that an observer might be present.

This more relaxed position makes the environmental plaintiffs' demands appear more reasonable, and it vitiates to some extent the Secretary's concern that the procedures for public hearings would interfere with preparation of the programs. The ruling sought by the environmental plaintiffs would be difficult to apply, however, and would undoubtedly lead to disputes and interpretive difficulties. Moreover, the central issue—whether the state officials may meet pivately with the Secretary or his designees to discuss the state program—remains unchanged.

rulemaking, the requirement in the Act for a hearing in the submitting state prior to program approval provides a basis for similar restrictions on *ex parte* communications. Finally, they urge the court to hold that the Federal Advisory Committee Act requires that communications between the Department of the Interior and the states be made public.[10]

The Secretary argues that, regardless of the characterization of the state program approval process, it is imperative that the Secretary consult with officials from the states on an informal, ongoing basis, both to provide information and to discuss matters of substance. According to the Secretary, the public access provisions of the Act are already adequate, and recent cases in the United States Court of Appeals for the District of Columbia Circuit limiting *ex parte* contacts arose in the context of private parties and should not be applied to communications between state officials and officers of the Federal government.

The court agrees that on the facts of this case the plaintiffs are not entitled to the relief they seek. The court distinguishes between the "presubmission" and "postsubmission" stages of state program preparation. The presubmission period is that period of time after the promulgation of the final OSM regulations (March 13, 1979) and the formal submission of a state program to OSM for review (March 3, 1980, under the terms of the court's Order). The "postsubmission" stage commences when the OSM receives the program, and continues until the program is either accepted or rejected. The court will not rule at this time on the "postsubmission" period issues, although it would appear that a more formal relationship between OSM and the states would be appropriate during the postsubmission period. No

[10] The court concludes that the Federal Advisory Committee Act claim is entirely without merit.

ruling is required, because the postsubmission period will be the subject of "guidelines" to be issued by the Secretary. 44 Fed. Reg. 14958 (1979).

The Secretary initially concluded in issuing the proposed regulations that the process of approving a state program was a rulemaking proceeding. *See* 43 Fed. Reg. 41676 (1978). Accordingly, he proposed that, *after* the submission of state programs for approval, the process be open to all parties, without *ex parte* communications. In the Preamble to the Final Regulations, however, the Secretary stated that a number of commentators had requested that *presubmission* meetings be open to the public, and that a state, by contrast, proposed that the OSM Regional Director be allowed to assist in the preparation of state programs in an advisory capacity, including a preliminary review of the program without public notice and participation. The Secretary then stated:

> The Office has not accepted these comments to establish requirements within the regulations for presubmission and postsubmission meetings between the office and a State to discuss program development. These final regulations therefore do not specifically prohibit ex parte contact prior to or following program submission. It should be noted that this explanation represents a change in intended policy from that contained in the Preamble to the proposed regulations. The recommendation to change the regulation to provide for open meetings between the States and OSM has not been accepted since it is not required by the Act. The presubmission meetings will be crucial to program development and the Office intends to meet often with States during this time to provide assistance. Many of these meetings are likely to be working sessions which extend over days or weeks. With regard to meetings following program submission. [sic] The Office intends to issue

> procedural guidelines prior to submission of State programs. These guidelines will address the format for post-submission exchanges that will occur between OSM and the State. It must be noted that the final regulations provide for an additional period of time following program submissions in which States will be permitted to make modifications. Certainly there must be free exchange between OSM and the State during this additional period for program modification. The provisions for public participation in the development process are discussed further in Part 732.

44 Fed. Reg., 14958 (1979). Part 732 of the final regulations allows parties to receive notice of a proposed plan, and affords them with an opportunity to comment on the proposed State program. See 44 Fed. Reg. 15326 (1979).

The Secretary does not seriously maintain that the promulgation and approval of a state plan is not a rulemaking proceeding, and it appears that, at least from the time of the submission of the proposed plan, it is a rulemaking proceeding. Section 526 of the Act, 30 U.S.C.A. § 1276 (Supp. 1978), is divided into two parts. Subsection (a)(1), read in context, applies to rulemaking proceedings. Subsection (a)(2), read in context, applies to adjudicative proceedings. At some point in the process, the preparation of a state program seems to become equivalent to "any other action constituting rulemaking," subject to review under the arbitrary and capricious standard. The plaintiffs maintain that the "submission and approval-disapproval of State programs contain all the indicia of an informal rulemaking." NWF Memorandum, p. 20. Significantly, they point to the entire panoply of *post*submission procedures in support of this contention.[11] It is far from clear that the initial prepa-

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[11] These include "[a]s in any other rulemaking," NWF Memorandum at 20, publication of the plan for public comment, the hold-

ration of a plan at the state level constitutes a rulemaking proceeding.[12] Moreover, even the case law cited by the plaintiffs views the formal issuance of a notice of proposed rulemaking as the key factor triggering the *ex parte* contacts doctrine. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977). The court concludes that the presubmission period is not a "rulemaking." Even if it were, the court agrees with the Secretary that on the facts of this case informal meetings are not improper.

None of the recent *ex parte* contact cases involved the situation now before the court. In *National Small Shipments Traffic Conference, Inc.* v. *ICC*, 590 F.2d 345 (D.C. Cir. 1978) the Court of Appeals concluded that the ICC violated a requirement that any determination of a tariff's fairness be made after a "hearing" by allowing *ex parte* contacts to provide the basis for a decision to discontinue a ratemaking investigation. *Id.* at 350-51 The *ex parte* communications were between the ICC and "counsel for the Eastern Carriers," who were intimately involved in the ratemaking proceeding, as well as "extra-record statements made by representatives of the carriers . . . ." *Id.* at 348-49. The court determined that, although the ICC has substantial flexibility in structuring its "hearings," certain minimum constraints, including a ban on *ex parte* proceedings, must be observed.

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ing of at least one public hearing, and obtaining the concurrence of the Administrator of the EPA. In addition, the Secretary has by the regulations currently under review required a two-tier system of approval, beginning with review, comment, and public meetings at the regional level, followed by a decision by the Secretary. *See* 30 C.F.R. § 732.

[12] The agency's own policies to date have been to require procedural protection against *ex parte* contacts after the public announcement and circulation of the draft proposed regulations.

Id. at 351.[13] In *United States Lines* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978), the court struck down an amendment to a "joint service agreement" that allowed competitors of a petitioning party to operate jointly in maritime trade between North America and Europe. *Id.* at 523-24. One of the reasons for striking down the amendment was the existence of *ex parte* contacts between the Commission and a party to the quasi-adjudicatory proceedings as well as between the Commission and representatives of the French and German governments. *Id.* at 537-38. These communications were not reported to the primary party to the proceeding. As the court stated:

> USL was not informed of, let alone given the opportunity to respond to, the new arguments of Euro-Pacific or if the French and German governments as to the proposed agreement. Nor did USL know of or have the opportunity to respond to the arguments which Euro-Pacific conveyed secretly to the Commission in response to USL's protest. And it was after consideration of these *ex parte* arguments and responses, with no opportunity to further rebuttal, that the Commission reversed its position on participation of ICT.

Id. at 540-41. The Court of Appeals also remanded a rulemaking record for supplementation in *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir. 1977), because of *ex parte* contacts involving virtually every participant in proceedings before the Commissidon. *Id.* at 52.

Finally, in *Environmental Defense Fund* v. *Blum*, 458 F.Supp. 650 [12 ERC 1088] (D.D.C. 1978), Judge Gesell

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[13] According to the Court of Appeals, *ex parte* contacts are "offensive" in two respects. First, they "violate the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decisionmaking." Second, they "foreclose effective judicial review of the agency's final decision." 590 F.2d at 351.

remanded a decision allowing the use of a pesticide to the agency because of "procedural defects which permeate the balance of the agency's rulemaking." *Id.* at 659. A substantial amount of information, including several submissions by the State of Mississippi, was submitted to the agency without an opportunity for adversarial comment, even after the close of the rulemaking period. *Id.* at 660.

The present case is distinguishable in a number of respects from the cases cited above. First, most of the contacts complained of in the cases above were from private parties regarding a private benefit from the agency. *EDF* v. *Blum* does not mean, as the environmental plaintiffs suggest, that state officials automatically are in the same position as private parties when talking with federal officials. It does counsel a close look at the nature of their activities. Second, the Office of Surface Mining and the state regulatory officials involved are charged with the responsibility of working cooperatively in formulating state programs. This is designed to be a non-adversary proceeding, particularly during the presubmission stage. Most important, in this case the contacts between state and federal officials during the presubmission stage will result in a *proposed* state program. During the postsubmission stage, interested parties will have ample opportunities to examine and comment upon the proposed regulatory program, removing the central problem of *EDF* v. *Blum*. It is for this reason that the plaintiffs' "hearing" argument lacks merit.

The doctrine proscribing *ex parte* contacts has enjoyed substantial growth in recent years, but it is not an inflexible, mechanical rule. The court concludes that in the case at bar the dangers associated with such contacts are not present in the ongoing consultation between state and federal officials prior to the submission of a state program. The Secretary has explained that

flexibility is required in ongoing contacts over days or weeks while all concerned are explaining and discussing the requirements of the Act. This is not arbitrary or capricious.

Summary judgment shall be entered for the defendants on this issue.

Environmental Plaintiffs: Motions to Compel Discovery

After the initiation of this action, the environmental plaintiffs initiated discovery regarding allegedly illegal *ex parte* contacts between the Office of Surface Mining and the President's Council of Economic Advisors ("CEA"). These contacts allegedly took place after the close of the comment period on the permanent regulations. and allegedly had a substantial impact on the air quality sections of the regulations. The environmental plaintiffs filed interrogatories, a request for production of documents, and a motion to supplement the record, as well as noticing several depositions. The Secretary opposed this motion, arguing that as a matter of law contacts between the CEA, as a presidential advisor, and the OSM as part of a Cabinet-level agency, are not illegal, so that the threshold showing for discovery had not been made. The parties briefed this issue pursuant to a court-approved schedule for argument on July 25 and a decision at this time.

The environmental plaintiffs agree that consultation between the President's advisors and other entities in the executive branch is not illegal. Their argument concerns the procedures employed in the present case, whereby the CEA, after conducting itself throughout the rulemaking as an outside party, suddenly transformed itself into a consultant to the Secretary. They maintain that if the CEA decides to act as an "insider," then it must "play by the rules." Moreover, according to the environmental plaintiffs, the CEA violated traditional

norms of rulemaking procedure, at least for "insiders," by engaging in extensive solicitation of comments from industry groups and presenting these views to the Secretary as CEA's own views.

The court will deny most of the discovery sought by the environmental plaintiffs, but will permit a limited amount of exploration to determine whether documents exist that were presented off-the-record to CEA without the opportunity for adversarial comment.

The parties do not do not dispute the general rule that review of administrative actions must take place on the basis of the administrative record, and that the courts are reluctant to permit discovery in such cases. *See, e.g., Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832 (D.C. Cir. 1976), and cases cited therein. It is axiomatic, however that the courts must ensure that documents actually relied upon by the decisionmaker were subjected to adversarial comment and have been placed in the record for subsequent review.

The court concludes that much of the information sought by the environmental plaintiffs probes too deeply into the deliberative process of the agency to be justifiable discovery on the record in this case. A review of the interrogatories and the request for production of documents indicates that the plaintiffs seek to explore each and every contact between OSM, CEA, and various officials and entities engaged in the rulemaking proceeding, as well as all steps taken by the Secretary in examining, deciding, and approving the permanent regulations. Interrogatory Number Five, for example, requests a list and description of every contact between "personnel in the Office of the Assistant Secretary and personnel in OPA/PBA between September 18, 1978, and March 13, 1979." Both of these entities, according to the environmental plaintiffs' own definitions, are within the Department of the Interior. The court need not review further

similar examples. It is sufficient to note that (1) the environmental plaintiffs were well aware of CEA's position on air quality; (2) CEA prepared a list of contacts received to meet with OSM officials; and (3) the comment period was reopened in early 1979 to allow adversarial comment on contacts with CEA. Given this predicate for the orderly development of a record, and given the environmental plaintiffs' concessions that communications between the CEA and the OSM were not improper, the court will not compel an exploration of the internal decisionmaking process. The environmental plaintiffs' desire to explore the "effects" of CEA/OSM contacts does not overcome the presumption that internal agency contacts are proper.

The plaintiffs have made a showing, however, that there might have been contacts between industry sources and the CEA that provided substantive information which was relied upon by the CEA and eventually the Secretary without being placed on the public record. The environmental plaintiffs refer, for example, to a submission from Grafton Coal, and a study done by the Environmental Research and Technology, Inc., DOE contractors, as examples of submissions that were off the record and might still be outside the administrative record. To ensure that the record is complete, the court will permit a limited amount of discovery to determine what contacts the CEA had with outside parties during the rulemaking proceeding, how much of this information was subjected to comment in early 1979, and how much, if any, remains outside the record before this court.

The interrogatories propounded by the environmental plaintiffs clearly are overbroad and unjustified on the record of this case, and the motion to compel as to them will be denied in its entirety. The requests for production of documents will be allowed only to the extent that they seek the production of documents received by CEA

from outside parties between September 18, 1978, and March 13, 1979, that have not been placed on the public record. The motion to supplement the record will be denied, because the court concludes that the proffered material constitutes internal guidelines not binding on the agency and that it was not a part of the Secretary's deliberations in promulgating the regulations under review. The noticed depositions will not be had.

IV.

THE INDUSTRY PLAINTIFFS' ATTACK ON THE PERMIT APPLICATION REGULATIONS

The industry plaintiffs have mounted an assault on the Secretary's permit application regulations contained in 30 C.F.R. §§ 778-82. The Peabody Coal Company argues that the "cumulative burden" of the regulations is so great that the coal mining industry will be irreparably harmed by the cost of preparing applications for permits to continue the operation of existing mines. Peabody also argues that the requirement imposed by the regulations that the application be "complete" when submitted, and that the entire application be submitted within two months of the implementation of a regulatory program goes beyond the Secretary's authority and raises serious constitutional questions. The Pennsylvania plaintiffs agree with the Peabody Memorandum, and supplement it with argument of their own, focusing on the impact of the permit regulations on small operators in Pennsylvania. Finally, the National Coal Association and the American Mining Congress, et al., ("NCA/AMC") concur in the Peabody arguments as well as contending that the Secretary's basis and purpose statement fails adequately to address the question of impact on the industry.

After considering the memoranda submitted by the industry plaintiffs and the response filed by the defendants, the court concludes that the industry plaintiffs

have failed to make the showing required for the grant of injunctive relief.[14]

Likelihood of Success on the Merits

Section 502(d) of the Act, 30 U.S.C.A. § 1252(d) (Supp. 1978) requires the filing of a permit for existing mines:

> (d) Not later than two months following the approval of a State program pursuant to Section 503 or the implementation of a Federal program pursuant to 504, . . . all operators of surface coal mines in expectation of operating such mines after the expiration of eight months from the approval of a State program or the implementation of a Federal program, shall file an application for a permit with the regulatory authority. . . .

The penalty for failing to submit an application for a permit is the cessation of surface mining activity eight months after the implementation of a regulatory program. 30 U.S.C.A. § 1256(a) (Supp. 1978). The permit application requirements are set forth in Section 507 of

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[14] While this case was under advisement the United States Court of Appeals for the Fourth Circuit ruled in *Virginia Surface Mining & Reclamation, Inc.* v. *Andrus*, —— F.2d —— [13 ERC 1554] (No. 79-1146, August 10, 1979), that the proper standards for injunctive relief are those set forth in Section 526(c) of the Act, 30 U.S.C.A. § 1276(c) (Supp. 1978). The court has examined those criteria and concludes that they are similar to the standards uniformly used in this Circuit, except that they lack a discussion of irreparable harm to the plaintiffs. The court, in the absence of controlling precedent in this circuit, concludes that a court sitting in an equitable role should always consider harm to the plaintiff if injunctive relief is denied. Moreover, the court is not sure that this case involves an "order or decision" of the Secretary. The court has nonetheless reassessed its findings in light of the recent decision, concluding that the findings should remain undisturbed.

the Act, 30 U.S.C.A. § 1257, and they include the requirement that each application contain a reclamation plan, the details of which are set forth in Section 508 of the Act. *Id.* §§ 1257(d); 1258. The statutory requirements for a permit are exceedingly detailed and comprehensive. The Secretary promulgated regulations that compounded the detail required by the Act. These are parts 778-80 of C.F.R., establishing specific requirements for application contents for surface coal mines, and parts 782-84, establishing requirements for applications for underground coal mines. 44 Fed. Reg. 15349-15370 (March 13, 1979). The Secretary, in conformity with the Act, requires the application to be filed within two months after the approval of a regulatory program. 30 C.F.R. § 771.21(a)(1). He went beyond the explicit terms of the Act, however, in requiring the application to be "complete," which means that it must contain all information required under the Act, the regulations, and the regulatory program. *Id.* § 770.5; 771.13. The Secretary's basis and purpose statement for the two-month period and the "complete" application requirement was as follows:

> Several commenters stated that the requirement for having a valid permit to mine coal within eight months from the date on which a regulatory program is approved by the Secretary was much too short. Because two months are allowed for operators to file applications after the program is approved, six months remain for the regulatory authority to review the application. Under Section 506(a), however, permits for existing mines continue in effect, if the regulatory authority does not act within six months. Several commenters felt that the six-month review period was too long. The comments were rejected, because these time limits are required by Section 502(d) and 506(a) of the Act.

30 C.F.R. § 771, 44 Fed. Reg. 15014.

Several commenters requested that the reference in proposed Section 771.13(a) to a "complete" application be deleted. This comment was rejected. Public participation and the review process cannot go forward until a "complete application" is on file, as required by sections 502(d), 513, and 514 of the Act. Ordinarily, those processes will take approximately six months to conclude, so that complete applications are needed within two months of institution of the permanent regulatory program if the regulatory authority is to meet the eight-month deadline of Section 506(a) of the Act.

30 C.F.R. § 771.13, 44 Fed. Reg. 15015.

Several commenters objected to the two-month application filing deadline after initial institution of permanent regulatory programs. These comments were rejected, because that date is required under Section 502(d) of the Act.

The Office also notes that the final rules have eliminated the provisions for mandatory one full-year data collection requirements at Sections 779.16 and 783.16. Those provisions were cited by the commenters objecting to the two-month deadline as the major obstacle to meeting that time limit. As with other aspects of the application, that change allows for the use of existing data to extrapolate, through valid predictive devices such as modeling, to satisfy the requirements of parts 779-780, 783-784.

30 C.F.R. § 771.21, 44; Fed. Reg. 15016.

Comments were rejected that suggested requirements be lessened under paragraph (a), to allow for the staged submission of application information for up to 17 months after initiation of a permanent regula-

> tory program. Sections 502(d) and 506(a) of the Act contemplate that existing operations will have been reviewed and their applications fully processed and evaluated not later than eight months from institution of a State or Federal program. Public participation requirements, regulatory authority review, and coordination with other government entities will require most of the six months prior to the eight-month deadlines. Those requirements make it imperative that complete applications be provided to the regulatory authority within the two-month deadline of Section 502(d) of the Act and 30 CFR 771.21(a)(1).

Id.

The claims made by the industry plaintiffs boil down to three basic contentions. First, they maintain that the cumulative impact of the regulations is so overwhelming that the regulations should be modified to permit companies to submit the minimum information required by the Act. Peabody admits, however, that the regulations, when viewed as a whole, appear to be based on the statutory requirements of 30 U.S.C. §§ 1257 and 1258. The court has compared numerous sections of the regulations with the Act, and finds that the remaining industry plaintiffs are not likely to prevail on a claim that the regulations depart from the intent of the statute.[15]

Peabody's request for relief boils down to an attempt to have the court amend the permit regulations by slash-

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[15] At the hearing in this matter, the court questioned counsel for Peabody concerning its concession that each particular part of the regulations appeared to have a statutory basis. Counsel for the remaining industry plaintiffs stated that they did not agree with that concession and intended to challenge numerous portions of the permit regulations as lacking a statutory basis. The court's determination at this preliminary stage that the regulations appear to be based on the statute will not preclude challenges to individual portions of the permit regulations.

ing most of the requirements specified in the regulations. The appendix containing suggested revisions to the regulations would have the court amend the regulations to provide for staged submissions of information or to allow the applicant for a permit to ignore informational requirements which the regulatory agency does not need or desire. Although couched in terms of preliminary relief, this would place the court in the position of rewriting, for the indefinite future, numerous complex and technical regulations. The court lacks the necessary expertise for this endeavor. Moreover, many of the disputes over the ability to use modeling, statistical information, and information in the hands of the agency have been resolved, at least in part, by the submission by Peabody and the defendants of counter forms of orders. After considering Peabody's proposed order and the defendants' response, the court will sign the defendants' form of order, which will be incorporated into this opinion. This will not satisfy Peabody entirely, but it does vitiate some of Peabody's contentions regarding the unreasonable nature of the regulations.

The second basic contention put forth by Peabody is that the two-month deadline for submission of permit applications, coupled with the requirement that the applications be "complete" when filed, is arbitrary and capricious and will impose a crushing burden on the industry. The court is sympathetic to the burdensome argument, but must disagree that the requirement that applications be "complete" is arbitrary or capricious. As the Secretary indicated, the Act requires that permits be filed within two months after the approval of a regulatory program. 30 U.S.C.A. § 1252(d) (Supp. 1978). The Secretary exercised his rulemaking authority to specify that the application be complete. It appears from the record that the states opposed the industry's staged submission proposal. It is evident from the basis and purpose statement that the Secretary concluded that the

needs of the public to review the application and of the various administrative agencies to act upon it within six months required that the application be complete when filed. The court concludes that this was not arbitrary or capricious, and that the basis and purpose statement adequately sets forth the reasoning behind the Secretary's decision.[16]

Peabody's third major contention is that the Secretary has usurped the authority of the state regulatory agencies to define the information they require for permit decisions. To the extent that this challenge is based on the language of the Act, it is without merit. Although Section 507 refers consistently to the "regulatory authority," which ordinarily will be the states, the mere reference to the regulatory authority does not mean that the Secretary cannot promulgate regulations covering the permit process. First, the structure of the Act is such that the regulatory authority could be either the state or the federal government, depending on whether an adequate plan has been submitted and approved. Second, the Secretary has the authority to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act," *see* 30 U.S.C.A. § 1211(c)(2), and the plaintiffs have pointed to nothing that would derogate from this authority in the permit application area. To the extent that the challenge to the permit application regulations is based on a belief that the regulations themselves afford the states with almost no discretion, the court concludes that a ruling on this claim would be premature. The "state window" provisions of the regulations are hotly contested. The court issued an injunction on July 25 that provides the states with more time to prepare alternative proposals to meet the purposes of the act. Finally, the adequacy of the

[16] This holding disposes of the preliminary claim made by the NCA-AMC plaintiffs.

discretion left to the states can best be evaluated during consideration of this action on the merits. The court concludes that the plaintiffs have failed to demonstrate that they are likely to prevail on their claim that the permit regulations, taken as a whole, provide insufficient discretion to the states.

Finally, Peabody contends that the denial of relief would raise "serious constitutional problems." This contention is without merit.

The Pennsylvania plaintiff maintains that the permit regulations will devastate small producers of coal in Pennsylvania, where the industry consists in large part of small producers who mine less than 300,000 tons of coal annually. Their position is that the time necessary to prepare applications and the cost involved will injure them financially and cause gaps in production, leading to severe cash flow problems that will put many producers out of business. They argue that Congress could not have intended this result. The court concludes that the Pennsylvania plaintiffs are not likely to succeed on the merits of their claim that an exception for small producers greater than that provided by the Act should be carved out by the court.

As the Secretary notes, Congress accorded small producers special treatment in numerous areas of the Act. Producers of less than 100,000 tons were excepted from the interim regulatory program until January 1, 1979. 30 U.S.C.A. § 1252(c) (Supp. 1978). They can request the regulatory authority to assume the cost of determining hydrologic consequences and analyzing test borings or core samplings. *Id.* § 1257(c). The court agrees with the Secretary that "Congress did make special provision for small operators. Where it made no such exception, its choice to cover those operators must be viewed as deliberate." Defendants' Memorandum in Opposition to Various Motions for Preliminary Relief, p. 55.

Irreparable Harm to the Plaintiffs

The industry plaintiffs maintain that they will be irreparably injured by the cost of compiling permit information if injunctive relief is denied. Although the court is sympathetic to the obvious problems of cost and the difficulties of meeting the two-month deadline, the court concludes that the plaintiffs have not made a sufficient showing of immediate and irreparable injury to justify the issuance of an injunction. In the first place, the grant of injunctive relief to the states may lead to the extension of the June 3, 1980 deadline for the institution of a permanent program. The Secretary has been actively seeking this remedy from Congress. The grant of an extension would give the industry seven more months in which to prepare permit applications for existing mines. Second, much of the industry plaintiffs' case for irreparable injury rests on allegations that information cannot be compiled in time. These contentions are hotly disputed by the Secretary, and it appears to the court that many of the disputes over the industry's ability to employ statistical methods and materials on file have been largely resolved. Thus, both the time involved and the cost of preparing permit applications are likely to be substantially less than the industry estimates. Finally, it appears to the court that small operators will be able to obtain assistance through the Small Operators' Assistance Program. The court concludes that the industry plaintiffs have failed to demonstrate a sufficient level of irreparable harm to overcome their weak case on the merits. *A. O. Smith* v. *FTC*, 530 F.2d 515 (3d Cir. 1976).

Harm to Third Parties and the Public Interest

The public has an interest in the continued production of coal in sufficient quantity to help ease the existing shortage of energy. The public also has an interest,

however, in reviewing permit applications that are as complete as possible. Complete information ensures to the maximum possible degree that the environmental degradation will not result from the improvident grant of a permit. Congress recognized the conflicting tensions between these goals, and struck a legislative balance between them. In striking that balance, it is obvious from the statute that Congress considered detailed permit applications to be a key factor in regulating the production of coal. This congressional intent should not be thwarted on the record presently before the court.

The industry plaintiffs' motions for preliminary injunctive relief will be denied. An appropriate order reflects the conclusions of the court.

ORDER

Upon consideration of the various motions for preliminary relief that have been filed in this case, the record, and the hearing before the court on July 25, 1979, it is by this court, this *21st* day of August, 1979, in accordance with the foregoing Memorandum

ORDERED, that the Preliminary Injunction issued by the court on July 25, 1979, shall remain in force as provided in that Injunction, and it is further

ORDERED, that the environmental plaintiffs' motions for preliminary relief shall be, and they hereby are, denied, and summary judgment entered against them as to the claims raised in the motions for preliminary relief, and it is further

ORDERED, that the environmental plaintiffs' motion to compel discovery shall be, and it hereby is, denied, except to the extent of discovering whether documents submitted to the CEA have not been made part of the record or have not been the subject of adversarial comments, and it is further

ORDERED, that the motions for preliminary relief filed by the three groups of industry plaintiffs shall be, and they hereby are, denied, and it is further

ORDERED, as provided the Secretary's proposed form of Order, that

(1) Permit applicants may comply with the requirements of 30 C.F.R. Parts 778-780 and 782-784 by reliance upon accurate data already in the possession of the applicant or the regulatory authority, through incorporating such data by reference into permit applications, provided that the incorporated information is made publicly available under Sections 507 and 513 of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1257 and 1263, and 30 C.F.R. Section 786.11;

(2) Permit applicants may comply with 30 C.F.R. Parts 778-780 and 782-784, by providing accurate descriptive and predictive information relating to geology, water quality and quantity for a particular mine plan area, based upon expert opinion extrapolation from known data on the geology, water quality and quantity of similar areas, rather than by the collection of new data for the particular site, provided that the data used by an expert is included within the permit application, the expert opinion is approved by the regulatory authority, and made available to the public for review and inspection;

(3) Permit applicants may comply with the requirements for submitting information on the seasonal variability of surface water quality and quantity and climatological information under 30 C.F.R. Sections 779.16, 779.18, 783.16, 783.18, without the collection of data covering 12 consecutive months, if accurate statistical procedures, as approved by the regulatory authority, are used to extrapolate from data collected in less time;

(4) Persons conducting surface coal mining and reclamation operations on Indian lands are not subject to 30 C.F.R. Parts 778-780 and 782-784 until further action by the Secretary pursuant to Section 710 of the Act; and

(5) Nothing herein shall be construed to affect the rights reserved to the States by Section 505 of the Act, 30 U.S.C. 1255, to impose more stringent permit application requirements.

APPENDIX G

91 STAT. 445

PUBLIC LAW 95-87—AUG. 3, 1977

Public Law 95-87
95th Congress

AN ACT

Aug. 3, 1977
[H.R. 2]

To provide for the cooperation between the Secretary of the Interior and the States with respect to the regulation of surface coal mining operations, and the acquisition and reclamation of abandoned mines, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Surface Mining Control and Reclamation Act of 1977".

* * * *

SEC. 101. The Congress finds and declares that—

(a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;

(b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.

(e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this Act is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States;

(g) surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground coal on which little or no reclamation was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this Act is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

* * * *

SEC. 102. It is the purpose of this Act to—

(a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;

(b) assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations;

(c) assure that surface mining operations are not conducted where reclamation as required by this Act is not feasible;

(d) assure that surface coal mining operations are so conducted as to protect the environment;

(e) assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with the surface coal mining operations;

(f) assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided and strike a balance between protection of the environment and agricultural productivity and the Nation's need for coal as an essential source of energy;

(g) assist the States in developing and implementing a program to achieve the purposes of this Act;

(h) promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public;

(i) assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act;

(j) provide a means for development of the data and analyses necessary to establish effective and

reasonable regulation of surface mining operations for other minerals;

* * * *

(k) encourage the full utilization of coal resources through the development and application of underground extraction technologies;

(l) stimulate, sponsor, provide for and/or supplement present programs for the conduct of research investigations, experiments, and demonstrations, in the exploration, extraction, processing, development, and production of minerals and the training of mineral engineers and scientists in the field of mining, minerals resources, and technology, and the establishment of an appropriate research and training center in various States; and

(m) wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.

SEC. 201. (a) There is established in the Department of the Interior, the Office of Surface Mining Reclamation and Enforcement (hereinafter referred to as the "Office").

* * * *

(c) The Secretary, acting through the Office, shall—

(1) administer the programs for controlling surface coal mining operations which are required by this Act; review and approve or disapprove State programs for controlling surface coal mining operations and reclaiming abandoned mined lands; make those investigations and inspections necessary to insure compliance with this Act; conduct hearings, administer oaths, issue subpenas, and compel the

attendance of witnesses and production of written or printed material as provided for in this Act; issue cease-and-desist orders; review and vacate or modify or approve orders and decisions; and order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto;

(2) publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act;

(3) administer the State grant-in-aid program for the development of State programs for surface and mining and reclamation operations provided for in title V of this Act;

(4) administer the program for the purchase and reclamation of abandoned and unreclaimed mined areas pursuant to title IV of this Act;

(5) administer the surface mining and reclamation research and demonstration project authority provided for in this Act;

(6) consult with other agencies of the Federal Government having expertise in the control and reclamation of surface mining operations and assist States, local governments, and other eligible agencies in the coordination of such programs;

(7) maintain a continuing study of surface mining and reclamation operations in the United States;

(8) develop and maintain an Information and Data Center on Surface Coal Mining, Reclamation, and Surface Impacts of Underground Mining, which will make such data available to the public and the Federal, regional, State, and local agencies conducting or concerned with land use planning and agen-

cies concerned with surface and underground mining and reclamation operations;

(9) assist the States in the development of State programs for surface coal mining and reclamation operations which meet the requirements of the Act, and at the same time, reflect local requirements and local environmental and agricultural conditions;

(10) assist the States in developing objective scientific criteria and appropriate procedures and institutions for determining those areas of a State to be designated unsuitable for all or certain types of surface coal mining pursuant to section 522;

(11) monitor all Federal and State research programs dealing with coal extraction and use and recommend to Congress the research and demonstration projects and necessary changes in public policy which are designated to (A) improve feasibility of underground coal mining, and (B) improve surface mining and reclamation techniques directed at eliminating adverse environmental and social impacts;

(12) cooperate with other Federal agencies and State regulatory authorities to minimize duplication of inspections, enforcement, and administration of this Act; and

(13) perform such other duties as may be provided by law and relate to the purposes of this Act.

SEC. 501 (b) Not later than one year after the enactment of this Act, the Secretary shall promulgate and publish in the Federal Register regulations covering a permanent regulatory procedure for surface coal mining and reclamation operations performance standards based on and conforming to the provisions of title V and establishing procedures and requirements for preparation, submission, and approval of State programs; and development and implementation of Federal programs under the

title. The Secretary shall promulgate these regulations, which shall be concise and written in plain, understandable language in accordance with the procedures in section 501(a).

* * * *

SEC. 505. (a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

(b) Any provision of any State law or regulation in effect upon the date of enactment of this Act, or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act. The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act. Any provision of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act.

SEC. 506. (a) No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 503 of this Act, or no later than eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 504 of this Act, no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State

pursuant to an approved State program or by the Secretary pursuant to a Federal program; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 502 of this Act, may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this Act, but the initial administrative decision has not been rendered.

* * * *

SEC. 507. (a) Each application for a surface coal mining and reclamation permit pursuant to an approved State program or a Federal program under the provisions of this Act shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit issued pursuant to a State or Federal program. The regulatory authority may develop procedures so as to enable the cost of the fee to be paid over the term of the permit.

(b) The permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things—

(1) the names and addresses of (A) the permit applicant; (B) every legal owner of record of the property (surface and mineral), to be mined; (C) the holders of record of any leasehold interest in the property; (D) any purchaser of record of the property under a real estate contract; and (E) the operator if he is a person different from the applicant; and (F) if any of these are business entities other than a single proprietor, the names and addresses of the principals, officers, and resident agent;

(2) the names and addresses of the owners of record of all surface and subsurface areas adjacent to any part of the permit area;

(3) a statement of any current or previous surface coal mining permits in the United States held by the applicant and the permit identification and each pending application;

(4) if the applicant is a partnership, corporation, association, or other business entity, the following where applicable: the names and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of any person owning, of record 10 per centum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation within the United States within the last five-year period preceding the date of submission of the application;

(5) a statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant, has ever held a Federal or State mining permit which in the five-year period prior to the date of submission of the application has been suspended or revoked or has had a mining bond or similar security deposited in lieu of bond forfeited and, if so, a brief explanation of the facts involved;

(6) a copy of the applicant's advertisement to be published in a newspaper of general circulation in the locality of the proposed site at least once a week for four successive weeks, and which includes the ownership, a description of the exact location and boundaries of the proposed site sufficient so that the proposed operation is readily locatable by local residents, and the location of where the application is available for public inspection;

(7) a description of the type and method of coal mining operation that exists or is proposed, the engineering techniques proposed or used, and the equipment used or proposed to be used;

(8) the anticipated or actual starting and termination dates of each phase of the mining operation and number of acres of land to be affected;

(9) the applicant shall file with the regulatory authority on an accurate map or plan, to an appropriate scale, clearly showing the land to be affected as of the date of the application, the area of land within the permit area upon which the applicant has the legal right to enter and commence surface mining operations and shall provide to the regulatory authority a statement of those documents upon which the applicant bases his legal right to enter and commence surface mining operations on the area affected, and whether that right is the subject of pending court litigation: *Provided*, That nothing in this Act shall be construed as vesting in the regulatory authority the jurisdiction to adjudicate property title disputes.

(10) the name of the watershed location of the surface stream or tributary into which surface and pit drainage will be discharged;

(11) a determination of the probable hydrologic consequences of the mining and reclamation operation, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems including the dissolved and suspended solids under seasonal flow conditions and the collection of sufficient data for the mine site and surrounding areas so that an assessment can be made by the regulatory authority of the probable cumulative impacts of all

anticipated mining in the area upon the hydrology of the area and particularly upon water availability: *Provided, however,* That this determination shall not be required until such time as hydrologic information on the general area prior to mining is made available from an appropriate Federal or State agency: *Provided further,* That the permit shall not be approved until such information is available and is incorporated into the application;

(12) when requested by the regulatory authority, the climatological factors that are peculiar to the locality of the land to be affected, including the average seasonal precipitation, the average direction and velocity of prevailing winds, and the seasonal temperature ranges;

(13) accurate maps to an appropriate scale clearly showing (A) the land to be affected as of the date of application and (B) all types of information set forth on topographical maps of the United States Geological Survey of a scale of 1:24,000 or 1:25,000 or larger, including all manmade features and significant known archeological sites eixsting on the date of application. Such a map or plan shall among other things specified by the regulatory authority show all boundaries of the land to be affected, the boundary lines and names of present owners of record of all surface areas abutting the permit area, and the location of all buildings within one thousand feet of the permit area;

(14) cross-section maps or plans of the land to be affected including the actual area to be mined, prepared by or under the direction of and certified by a qualified registered professional engineer, or professional geologist with assistance from experts in related fields such as land surveying and landscape architecture, showing pertinent elevation and location of test borings or core samplings and depicting

the following information: the nature and depth of the various strata of overburden; the location of subsurface water, if encountered, and its quality; the nature and thickness of any coal or rider seam above the coal seam to be mined; the nature of the stratum immediately beneath the coal seam to be mined; all mineral crop lines and the strike and dip of the coal to be mined, within the area of land to be affected; existing or previous surface mining limits; the location and extent of known workings of any underground mines, including mine openings to the surface; the location of aquifers; the estimated elevation of the water table; the location of spoil, waste, or refuse areas and top-soil preservation areas; the location of all impoundments for waste or erosion control; any settling or water treatment facility; constructed or natural drainways and the location of any discharges to any surface body of water on the area of land to be affected or adjacent thereto; and profiles at appropriate cross sections of the anticipated final surface configuration that will be achieved pursuant to the operator's proposed reclamation plan;

(15) a statement of the result of test borings or core samplings from the permit area, including logs of the drill holes; and thickness of the coal seam found, an anlysis of the chemical properties of such coal; the sulfur content of any coal seam; chemical analysis of potentially acid or toxic forming sections of the overburden; and chemical analysis of the stratum lying immediately underneath the coal to be mined except that the provisions of this paragraph (15) may be waived by the regulatory authority with respect to the specific application by a written determination that such requirements are unnecessary;

(16) for those lands in the permit application which a reconnaissance inspection suggests may be prime farm lands, a soil survey shall be made or obtained according to standards established by the Secretary of Agriculture in order to confirm the exact location of such prime farm lands, if any; and

(17) information pertaining to coal seams, test borings, core samplings, or soil samples as required by this section shall be made available to any person with an interest which is or may be adversely affected: *Provided*, That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental content which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record.

(c) If the regulatory authority finds that the probable total annual production at all locations of any coal surface mining operator will not exceed 100,000 tons, the determination of probable hydrologic consequences required by subsection (b)(11) and the statement of the result of test borings or core samplings required by subsection (b)(15) of this section shall, upon the written request of the operator be performed by a qualified public or private laboratory designated by the regulatory authority and the cost of the preparation of such determination and statement shall be assumed by the regulatory authority.

(d) Each applicant for a permit shall be required to submit to the regulatory authority as part of the permit application a reclamation plan which shall meet the requirements of this Act.

(e) Each applicant for a surface coal mining and reclamation permit shall file a copy of his application for public inspection with the recorder at the courthouse

of the county or an appropriate public office approved by the regulatory authority where the mining is proposed to occur, except for that information pertaining to the coal seam itself.

(f) Each applicant for a permit shall be required to submit to the regulatory authority as part of the permit application a certificate issued by an insurance company authorized to do business in the United States certifying that the applicant has a public liability insurance policy in force for the surface mining and reclamation operations for which such permit is sought, or evidence that the applicant has satisfied other State or Federal self-insurance requirements. Such policy shall provide for personal injury and property damage protection in an amount adequate to compensate any persons damaged as a result of surface coal mining and reclamation operations including use of explosives and entitled to compensation under the applicable provisions of State law. Such policy shall be maintained in full force and effect during the terms of the permit or any renewal, including the length of all reclamation operations.

(g) Each applicant for a surface coal mining and reclamation permit shall submit to the regulatory authority as part of the permit application a blasting plan which shall outline the procedures and standards by which the operator will meet the provisions of section 515(b)(15).

SEC. 508. (a) Each reclamation plan submitted as part of a permit application pursuant to any approved State program or a Federal program under the provisions of this Act shall include, in the degree of detail necessary to demonstrate that reclamation required by the State or Federal program can be accomplished, a statement of:

(1) the identification of the lands subject to surface coal mining operations over the estimated life of

those operations and the size, sequence, and timing of the subareas for which it is anticipated that individual permits for mining will be sought;

(2) the condition of the land to be covered by the permit prior to any mining including:

(A) the uses existing at the time of the application, and if the land has a history of previous mining, the uses which preceded any mining; and

(B) the capability of the land prior to any mining to support a variety of uses giving consideration to soil and foundation characteristics, topography, and vegetative cover, and, if applicable, a soil survey prepared pursuant to section 507(b)(16); and

(C) the productivity of the land prior to mining, including appropriate classification as prime farm lands, as well as the average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management;

(3) the use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, and the comments of any owner of the surface, State and local governments or agencies thereof which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation;

(4) a detailed description of how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(5) the engineering techniques proposed to be used in mining and reclamation and a description of the major equipment; a plan for the control of surface water drainage and of water accumulation; a plan, where appropriate, for backfilling, soil stabilization, and compacting, grading, and appropriate revegetation; a plan for soil reconstruction, replacement, and stabilization, pursuant to the performance standards in section 515(b)(7) (A), (B), (C), and (D), for those food, forage, and forest lands identified in sections 515(b)(7); an estimate of the cost per acre of the reclamation, including a statement as to how the permittee plans to comply with each of the requirements set out in section 515;

(6) the consideration which has been given to maximize the utilization and conservation of the solid fuel resource being recovered so that reaffecting the land in the future can be minimized;

(7) a detailed estimated timetable for the accomplishment of each major step in the reclamation plan;

(8) the consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans, and applicable State and local land use plans and programs;

(9) the steps to be taken to comply with applicable air and water quality laws and regulations and any applicable health and safety standards;

(10) the consideration which has been given to developing the reclamation plan in a manner consistent with local physical environmental, and climatological conditions;

(11) all lands, interests in lands, or options on such interests held by the applicant or pending bids on interests in lands by the applicant, which lands

are contiguous to the area to be covered by the permit;

(12) the results of test boring which the applicant has made at the area to be covered by the permit, or other equivalent information and data in a form satisfactory to the regulatory authority, including the location of subsurface water, and an analylis of the chemical properties including acid forming properties of the mineral and overburden: *Provided*, That information which pertains only to the analysis of the chemical and physical properties of the coal (excepting information regarding such mineral or elemental contents which is potentially toxic in the environment) shall be kept confidential and not made a matter of public record;

(13) a detailed description of the measures to be taken during the mining and reclamation process to assure the protection of:

(A) the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process;

(B) the rights of present users to such water; and

(C) the quantity of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process or to provide alternative sources of water where such protection of quantity cannot be assured;

(14) such other requirements as the regulatory authority shall prescribe by regulations.

(b) Any information required by this section which is not on public file pursuant to State law shall be held in confidence by the regulatory authority.

APPENDIX H

[Title 30—*Code of Federal Regulations*]

CHAPTER VII—OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, DEPARTMENT OF THE INTERIOR

* * * *

PART 778—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

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AUTHORITY: Secs. 102, 201, 501, 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, 517, and 522, Pub. L. 95-87, 91 Stat. 945 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1267 and 1272).

SOURCE: 44 FR 15353, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 778.13, 778.14, 778.15, 778.16, 778.17, 778.18, 778.19, 778.20 and 778.21 have been approved by the U.S. General Accounting Office under number B-190462 (R0604).

§ 778.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions regarding the legal, financial, compliance, and general information that must be contained in permit applications for surface mining activities.

§ 778.2 Objective.

The objective of this part is to ensure that all relevant information on the ownership and control of persons who conduct surface mining activities, the ownership and control of the property to be affected by the operations, the compliance status and history of those persons, and other important information is provided in the application to the regulatory authority.

§ 778.4 Responsibility.

It is the responsibility of the permit applicant to provide to the regulatory authority all of the information required by this part.

§ 778.11 Applicability.

This part applies to any person who applies for a permit to conduct surface mining activities.

§ 778.13 Identification of interests.

(a) Each application shall contain the names and addresses of—

(1) The permit applicant, including his or her telephone number;

(2) Every legal or equitable owner of record of the property to be mined;

(3) The holders of record of any leasehold interest in the property to be mined;

(4) Any purchaser of record under a real estate contract of the property to be mined;

(5) The operators, if the operator is a person different from the applicant, including his or her telephone number; and

(6) The resident agent of the applicant who will accept service of process, including his or her telephone number.

(b) Each application shall contain a statement of whether the applicant is a corporation, partnership, single proprietorship, association or other business entity. For businesses other than single proprietorships, the application shall contain the following information, where applicable:

(1) Names and addresses of every officer, partner, director, or other person performing a function similar to a director of the applicant;

(2) Name and address of any person who is a principal shareholder of the applicant; and

(3) Names under which the applicant, partner, or principal shareholder previously operated a surface coal mining operation in the United States within the 5 years preceding the date of application.

(c) If any owner, holder, purchaser, or operator, identified under paragraph (a) of this section, is a business

entity other than a single proprietor, the application shall contain the names and addresses of their respective principals, officers, and resident agents.

(d) Each application shall contain a statement of any current or previous coal mining permits in the United States held by the applicant subsequent to 1970 and by any person identified in paragraph (b) (3) of this section, and of any pending permit application to conduct surface coal mining and reclamation operations in the United States. The information shall be listed by permit or application number and identify the regulatory authority for each of those coal mining operations.

(e) Each application shall contain the names and addresses of the owners of record of all surface and subsurface areas contiguous to any part of the proposed permit area.

(f) Each application shall contain the name of the proposed mine and the Mine Safety and Health Administration identification number for the mine and all sections, if any.

(g) Each application shall contain a statement of all lands, interests in lands, options, or pending bids on interests held or made by the applicant for lands which are contiguous to the area to be covered by the permit.

§ 778.14 Compliance information.

Each application shall contain—

(a) A statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant has—

(1) Had a Federal or State mining permit suspended or revoked in the last 5 years; or,

(2) Forfeited a mining bond or similar security deposited in lieu of bond.

(b) If any such suspension, revocation, or forfeiture has occurred, a statement of the facts involved, including—

(1) Identification number and date of issuance of the permit or date and amount of bond or similar security;

(2) Identification of the authority that suspended or revoked a permit or forfeited a bond and the stated reasons for that action;

(3) The current status of the permit, bond, or similar security involved;

(4) The date, location, and type of any administrative or judicial proceedings initiated concerning the suspension, revocation, or forfeiture; and

(5) The current status of these proceedings.

(c) A listing of each violation notice received by the applicant in connection with any surface coal mining operation during the 3-year period before the application date, for violations of any law, rule, or regulation of the United States, or of any State law, rule, or regulation enacted pursuant to Federal law, rule, or regulation, or of any provision of the Act pertaining to air or water environmental protection. The application shall also contain a statement regarding each violation notice, including—

(1) The date of issuance and identity of the issuing regulatory authority, department, or agency;

(2) A brief description of the particular violation alleged in the notice;

(3) The date, location, and type of any administrative or judicial proceedings initiated concerning the violation, including, but not limited to, proceedings initiated by the applicant to obtain administrative or judicial review of the violations;

(4) The current status of the proceedings and of the violation notice; and

(5) The actions, if any, taken by the applicant to abate the violation.

§ 778.15 Right of entry and operation information.

(a) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin surface mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide for lands within the permit area—

(1) A copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or

(2) A copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(3) If the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under the applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this section shall be construed to afford the regulatory authority the authority to adjudicate property title disputes.

§ 778.16 Relationship to areas designated unsuitable for mining.

(a) Each application shall contain a statement of available information on whether the proposed permit

area is within an area designated unsuitable for surface mining activities under 30 CFR Parts 764 and 765 or under study for designation in an administrative proceeding under those parts.

(b) If an applicant claims the exemption in 30 CFR 786.19(d)(2), the application shall contain information supporting the applicant's assertion that it made substantial legal and financial commitments before January 4, 1977, concerning the proposed surface mining activities.

(c) If an applicant proposes to conduct surface mining activities within 300 feet of an occupied dwelling, the application shall contain the waiver of the owner of the dwelling as required in 30 CFR 761.12(e).

[44 FR 15353, Mar. 13, 1979; 44 FR 66195, Nov. 19, 1979]

§ 778.17 Permit term information.

(a) Each application shall state the anticipated or actual starting and termination date of each phase of the surface mining activities and the anticipated number of acres of land to be affected for each phase of mining and over the total life of the permit.

(b) If the applicant proposes to conduct the surface mining activities in excess of 5 years, the application shall contain the information needed for the showing required under 30 CFR 786.25(a).

§ 778.18 Personal injury and property damage insurance information.

Each permit application shall contain either a certificate or liability insurance or evidence that the self-insurance requirements in 30 CFR 806.14 are satisfied.

§ 778.19 Identification of other licenses and permits.

Each application shall contain a list of all other licenses and permits needed by the applicant to conduct the pro-

posed surface mining activities. This list shall identify each license and permit by—

(a) Type of permit or license;

(b) Name and address of issuing authority;

(c) Identification numbers of applications for those permits or licenses or, if issued, the identification numbers of the permits or licenses; and

(d) If a decision has been made, the date of approval or disapproval by each issuing authority.

§ 778.20 Identification of location of public office for filing of application.

Each application shall identify, by name and address, the public office where the applicant will simultaneously file a copy of the application for public inspection under 30 CFR 786.11(d).

§ 778.21 Newspaper advertisement and proof of publication.

A copy of the newspaper advertisement of the application and proof of publication of the advertisement shall be filed with the regulatory authority and made a part of the complete application, not later than 4 weeks after the last date of publication required under 30 CFR 786.11(a).

PART 779—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

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AUTHORITY: Secs. 102, 201, 501, 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, and 522, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, and 1272).

SOURCE: 44 FR 15354, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 779.11, 779.12, 779.13, 779.14, 779.15, 779.16, 779.17, 779.18, 779.19, 779.20, 779.21, 779.22, 779.24, 779.25, and 779.27 have been approved by the U.S. General Accounting Office under number B-1190462 (R0605).

§ 779.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions for the environmental resources contents of applications for surface mining activities.

§ 779.2 Objectives.

The objectives of this part are to ensure that each application provides to the regulatory authority a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities.

§ 779.4 Responsibilities.

(a) It is the responsibility of the applicant to provide, except where specifically exempted in this part, all information required by this part in the application.

(b) It is the responsibility of State and Federal government agencies to provide information for applications as specifically required by this part.

§ 779.11 General requirements.

Each permit application shall include a description of the existing, premining environmental resources within the proposed mine plan area and adjacent areas that may be affected or impacted by the proposed surface mining activities.

§ 779.12 General environmental resources information.

Each application shall describe and identify—

a() The size, sequence, and timing of the subareas of the mine plan area for which it is anticipated that individual permits for mining will be requested over the estimated total life of the proposed surface mining activities; and

(b) The nature of cultural and historic resources listed or eligible for listing on the National Register of Historic Places and known archeological features within the proposed mine plan and adjacent areas. The description shall be based on all available information, including, but not limited to, data of State and local archeological, historical, and cultural preservation agencies.

§ 779.13 Description of hydrology and geology: General requirements.

(a) Each application shall contain a description of the geology, hydrology, and water quality and quantity of all lands within the proposed mine plan area, the adjacent area, and the general area. The description shall include information on the characteristics of all surface and ground waters within the general area, and any water which will flow into or receive discharges of water from the general area. The description shall be prepared according to §§ 779.13-779.17 and conform to the following:

(b) (1) Information on hydrology, water quality and quantity, and geology related to hydrology of areas outside the proposed mine plan area and within the general area shall be provided by the regulatory authority, to the extent that this data is available from an appropriate Federal or State agency.

(2) If this information is not available from those agencies, the applicant may gather and submit this in-

formation to the regulatory authority as part of the permit application.

(3) The permit shall not be approved by the regulatory authority until this information is made available in the application.

(c) The use of modeling techniques may be included as part of the permit application, but the same surface and ground water information may be required for each site as when models are not used.

§ 779.14 Geology description.

(a) The description shall include a general statement of the geology within the proposed mine plan area down to and including the first aquifer to be affected below the lowest coal seam to be mined.

(b) (1) Test borings or core samples from the proposed permit area shall be collected and analyzed down to and including the stratum immediately below the lowest coal seam to be mined to provide the following data in the description:

(i) Location of subsurface water, if encountered;

(ii) Logs of drill holes showing the lithologic characteristics and thickness of each stratum and each coal seam;

(iii) Physical properties of each stratum within the overburden including compaction and erodibility;

(iv) Chemical analyses of each stratum within the overburden and the stratum immediately below the lowest coal seam to be mined to identify, at a minimum, those horizons which contain potential acid-forming, toxic-forming, or alkalinity producing materials; and

(v) Analyses of the coal seam, including, but not limited to, an analysis of the sulfur, pyrite, and marcasite content.

(2) If required by the regulatory authority, test borings or core samplings shall be collected and analyzed to

greater depths within the proposed permit area, or for areas outside the proposed permit area to provide for evaluation of the impact of the proposed activities on the hydrologic balance.

(3) An applicant may request that the requirement for a statement of the results of the test borings or core samplings be waived by the regulatory authority. The waiver may be granted only if the regulatory authority makes a written determination that the statement is unnecessary because other equivalent information is accessible to it in a satisfactory form.

§ 779.15 Ground water information.

(a) The application shall contain a description of the ground water hydrology for the proposed mine plan and adjacent area, including, at a minimum—

(1) The depth below the surface and the horizontal extent of the water table and aquifers;

(2) The lithology and thickness of the aquifers;

(3) Known uses of the water in the aquifers and water table; and

(4) The quality of subsurface water, if encountered.

(b) The application shall contain additional information which describes the recharge, storage, and discharge characteristics of aquifers and the quality and quantity of ground water, according to the parameters and in the detail required by the regulatory authority.

§ 779.16 Surface water information.

(a) Surface water information shall be described, including the name of the watershed which will receive water discharges, the location of all surface water bodies such as streams, lakes, ponds, and springs, the location of any water discharge into any surface body of water, and descriptions of surface drainage systems sufficient

to identify, in detail, the seasonal variations in water quantity and quality within the proposed mine plan and adjacent areas.

(b) Surface water information shall include—

(1) Minimum, maximum, and average discharge conditions which identify critical low flow and peak discharge rates of streams sufficient to identify seasonal variations; and

(2) Water quality data to identify the characteristics of surface waters in, discharging into, or which will receive flows from surface or ground water from affected areas within the proposed mine plan area, sufficient to identify seasonal variations, showing—

(i) Total dissolved solids in milligrams per liter;

(ii) Total suspended solids in milligrams per liter;

(iii) Acidity;

(iv) pH in standard units;

(v) Total and dissolved iron in milligrams per liter;

(vi) Total manganese in milligrams per liter; and

(vii) Such other information as the regulatory authority determines is relevant.

§ 779.17 Alternative water supply information.

The application shall identify the extent to which the proposed surface mining activities may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed mine plan or adjacent areas for domestic, agricultural, industrial, or other legitimate use. If contamination, diminution, or interruption may result, then the description shall identify the alternative sources of water supply that could be developed to replace the existing sources.

§ 779.18 Climatological information.

(a) When requested by the regulatory authority, the application shall contain a statement of the climatological factors that are representative of the proposed mine plan area, including:

(1) The average seasonal precipitation;

(2) The average direction and velocity of prevailing winds; and

(3) Seasonal temperature ranges.

(b) The regulatory authority may request such additional data as deemed necessary to ensure compliance with the requirements of this Subchapter.

§ 779.19 Vegetation information.

(a) The permit application shall, if required by the regulatory authority, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife identified under 30 CFR 779.20.

§ 779.20 Fish and wildlife resources information.

(a) Each application shall include a study of fish and wildlife and their habitats within the proposed mine plan area and the portions of the adjacent areas where effects on such resources may reasonably be expected to occur.

(b) Prior to initiating such studies, the applicant shall contact the regulatory authority to determine what fish and wildlife resources information will be required.

(c) The regulatory authority, in consultation with the appropriate State and Federal fish and wildlife management, conservation, or land management agencies having responsibilities for fish and wildlife or their habitats, shall determine the level of detail and the areas of such studies, according to—

(1) Published data and other information;

(2) Site-specific information obtained by the applicant; and

(3) Written guidance obtained from agencies consulted.

§ 779.21 Soil resources information.

(a) The applicant shall provide adequate soil survey information of the permit area consisting of the following:

(1) A map delineating different soils;

(2) Soil identification;

(3) Soil description; and

(4) Present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of the analyses, trials, and tests required under 30 CFR 816.22.

§ 779.22 Land-use information.

(a) The application shall contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including—

(1) A map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed with-

in 5 years before the anticipated date of beginning the proposed operation, the historic use of the land shall also be described.

(2) A narrative of land capability and productivity, which analyzes the land-use description under paragraph (a) of this section in conjunction with other environmental resources information required under this part. The narrative shall provide analyses of:

(i) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover and the hydrology of the proposed permit area; and

(ii) The productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, State agricultural universities or appropriate State natural resource or agricultural agencies.

(b) The application shall state whether the proposed mine plan area has been previously mined, and, if so, the following information, if available—

(1) The type of mining method used;

(2) The coal seams or other mineral strata mined;

(3) The extent of coal or other minerals removed;

(4) The approximate dates of past mining; and

(5) The uses of the land preceding mining.

(c) The application shall contain a description of the existing land uses and land use classifications under local law, if any, of the proposed mine plan and adjacent areas.

§ 779.24 Maps: General requirements.

The permit application shall include maps showing—

(a) All boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the permit area;

(b) The boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin surface mining activities;

(c) The boundaries of all areas proposed to be affected over the estimated total life of the proposed surface mining activities, with a description of size, sequence, and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(d) The location of all buildings on and within 1,000 feet of the proposed permit area, with identification of the current use of the buildings;

(e) The location of surface and subsurface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to major electric transmission lines, pipelines, and agricultural drainage title fields;

(f) The location and boundaries of any proposed reference areas for determining the success of revegetation;

(g) The locations of water supply intakes for current users of surface water flowing into, out of, and within a hydrologic area defined by the regulatory authority, and those surface waters which will receive discharges from affected areas in the proposed mine plan area;

(h) Each public road located in or within 100 feet of the proposed permit area;

(i) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places

and known archeological sites within the mine plan and adjacent areas.

(j) Each public or private cemetery or Indian burial ground located in or within 100 feet of the proposed permit area;

(k) Any land within the proposed mine plan area and adjacent area which is within the boundaries of any units of the National System of Trails or the Wild and Science Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and

(l) Other relevant information required by the regulatory authority.

[44 FR 15345, Mar. 13, 1979; 44 FR 49685, Aug. 24, 1979]

§ 779.25 Cross sections, maps, and plans.

The application shall include cross sections, maps, and plans showing—

(a) Elevations and locations of test borings and core samplings;

(b) Elevations and locations of monitoring stations used to gather data for water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application;

(c) Nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(d) All coal crop lines and the strike and dip of the coal to be mined within the proposed mine plan area;

(e) Location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed mine plan and adjacent areas;

(f) Location and extent of sub-surface water, if encountered, within the proposed mine plan or adjacent areas;

(g) Location of surface water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and irrigation ditches within the proposed mine plan and adjacent areas;

(h) Location and extent of existing or previously surface-mined areas within the proposed mine plan area;

(i) Location and dimensions of existing areas of spoil, waste, and non-coal waste disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area;

(j) Location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the mine plan area and adjacent area;

(k) Sufficient slope measurements to adequately represent the existing land surface configuration of the proposed permit area, measured and recoded according to the following:

(1) Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed or, where this is impractical, at locations specified by the regulatory authority.

(2) Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances, or any other distance determined by the regulatory authority to be representative of the premining configuration of the land.

(3) Slope measurements shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to disturbed.

(l) Maps, plans, and cross sections included in a permit application which are required by this Section shall be prepared by or under the direction of and certified by a qualified registered professional engineer or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture and shall be updated as required by the regulatory authority.

§ 779.27 Prime farmland investigation.

(a) The applicant shall conduct a pre-application investigation of the proposed mine plan area to determine whether lands within the area may be prime farmland.

(b) Land shall not be considered prime farmland where the applicant can demonstrate one of the following—

(1) The land has not been historically used as cropland;

(2) The slope of the land is 10 percent or greater;

(3) The land is not irrigated or naturally subirrigated, has no developed water supply that is dependable or of adequate quality, and the average annual precipitation is 14 inches or less;

(4) Other factors exist, such as a very rocky surface or the land is frequently flooded during the growing season, more often than once in 2 years, and the flooding has reduced crop yield; or

(5) On the basis of a soil survey of lands within the mine plan area, there are no soil map units that have been designated prime farmland by the U.S. Soil Conservation Service.

(c) If the investigation establishes that the lands are not prime farmland, the applicant shall submit with the permit application a request for a negative determina-

tion which shows that the land for which the negative determination is sought meets one of the criteria of paragraph (b) of this section.

(d) If the investigation indicates that lands within the proposed mine plan area may be prime farmlands, the applicant shall contact the U.S. Soil Conservation Service to determine if a soil survey exists for those lands and whether the applicable soil map units have been designated as prime farmlands. If no soil survey has been made for the lands within the proposed mine plan area, the applicant shall cause such a survey to be made.

(1) When a soil survey of lands within the proposed mine plan area contains soil map units which have been designated as prime farmlands, the applicant shall submit an application, in accordance with 30 CFR 785.17 for such designated land.

(2) When a soil survey for lands within the proposed mine plan area contains soil map units which have not been designated as prime farmland after review by the U.S. Soil Conservation Service, the applicant shall submit a request for negative determination for non-designated land with the permit application establishing compliance with paragraph (b) of this section.

PART 780—SURFACE MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENT FOR RECLAMATION AND OPERATION PLAN

Sec.

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AUTHORITY: Sections 102, 201, 501, 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, 517, and 522, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1202, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1267, and 1272.)

SOURCE: 44 FR 15357, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 780.11, 780.12, 780.13, 780.14, 780.15, 780.16, 780.18, 780.21, 780.23, 780.25, 780.27, 780.29, 780.33, 780.35, and 780.37 have been approved by the U.S. General Accounting Office under number B-190462 (R0606).

§ 780.1 Scope.

This part provides the minimum requirements for the Secretary's approval of regulatory program provisions for the mining operations and reclamation plan portions of applications for permits for surface mining activities, except to the extent that different requirements for those plans are established under 30 CFR 785.

§ 780.2 Objectives.

The objectives of this part are to insure that the regulatory authority is provided with comprehensive and reliable information on proposed surface mining activities, and to ensure that those activities are allowed to be conducted only in compliance with the Act, this Chapter, and the regulatory program.

§ 780.4 Responsibilities.

(a) It is the responsibility of the applicant to provide to the regulatory authority all of the information required by this part, except where specifically exempted in this part.

(b) It is the responsibility of State and Federal governmental agencies to provide information to the regulatory authority where specifically required in this part.

§ 780.11 Operation plan: General requirements.

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed mine plan area, including, at a minimum, the following:

(a) A narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(b) A narrative explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facilities is necessary for postmining land use as specified in § 816.133):

(1) Dams, embankments, and other impoundments;

(2) Overburden and topsoil handling and storage areas and structures;

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures;

(4) Spoil, coal processing waste, and non-coal waste removal, handling, storage, transportation and disposal areas and structures;

(5) Mine facilities; and

(6) Water and air pollution control facilities.

§ 780.12 Operation plan: Existing structures.

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include—

(1) Location;

(2) Plans of the structure which describe its current condition;

(3) Approximate dates on which construction of the existing structure was begun and completed; and

(4) A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of Subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of Subchapter K of this chapter, a showing whether the structure meets the performance standards of Subchapter B (Interim Program Standards) of this chapter.

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of Subchapter K of this chapter.

(2) A construction schedule which shows dates for beginning and compuleting interim steps and final reconstruction;

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of Subchapter K of this chapter are met; and

(4) A showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

§ 780.13 Operation plan: Blasting.

Each application shall contain a blasting plan for the proposed permit area, explaining how the applicant intends to comply with the requirements of 30 CFR 816.61-816.68 and including the following:

(a) Types and approximate amounts of explosives to be used for each type of blasting operation to be conducted;

(b) Description of procedures and plans for recording and retention of information on the following during blasting—

(1) Drilling patterns, including size, number, depths, and spacing of holes;

(2) Charge and packing of holes;

(3) Types of fuses and detonation controls; and

(4) Sequence and timing of firing holes.

(c) Description of blasting warning and site access control equipment and procedures;

(d) Description of types, capabilities, sensitivities, and locations of use of any blast monitoring equipment and procedures proposed to be used;

(e) Description of plans for recording and reporting to the regulatory authority the results of preblasting surveys, if required; and

(f) Descripton of unavoidable hazardous conditions for which deviations from the blasting schedule will be needed under 30 CFR 816.65(b).

§ 780.14 Operation plan: Maps and plans.

Each application shall contain maps and plans of the proposed mine plan and adjacent areas as follows—

(a) The maps and plans shall show the lands proposed to be affected throughout the operation and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under 30 CFR 779.24-779.25.

(b) The following shall be shown for the proposed permit area unless specifically required for the mine plan area or adjacent area by the requirements of this Section:

(1) Buildings, utility corridors and facilities to be used;

(2) The area of land to be affected within the proposed mine plan area, according to the sequence of mining and reclamation;

(3) Each area of land for which a performance bond or other equivalent guarantee will be posted under Subchapter J of this Chapter;

(4) Each coal storage, cleaning and loading area;

(5) Each topsoil, spoil, coal waste, and non-coal waste storage area;

(6) Each water diversion, collection, conveyance, treatment, storage, and discharge facility to be used;

(7) Each air pollution collection and control facility;

(8) Each source of waste and each waste disposal facility relating to coal processing or pollution control;

(9) Each facility to be used to protect and enhance fish and wildlife and related environmental values;

(10) Each explosive storage and handling facility; and

(11) Location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance

with 30 CFR 780.25, and fill area for the disposal of excess spoil in accordance 30 CFR 780.35.

(c) Maps, plans, and cross-sections required under paragraphs (b)(4), (5), (10), and (11) of this section shall be prepared by, or under the direction of and certified by a qualified registered professional engineer, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture, except that—

(1) Maps, plans and cross-sections for sedimentation ponds may only be prepared by a qualified registered professional engineer; and

(2) Maps, plans, and cross-sections of spoil disposal facilities may only be prepared by a qualified registered professional engineer.

[44 FR 15357, Mar. 13, 1979; 44 FR 49685, Aug. 24, 1979]

§ 780.15 Air pollution control plan.

(a) For all surface mining activities with projected production rates exceeding 1,000,000 tons of coal per year and located west of the 100th meridian west longitude, the application shall contain an air pollution control plan which includes the following:

(1) An air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under paragraph (a)(2) of this section to comply with Federal and State air quality standards; and

(2) A plan for fugitive dust control practices as required under 30 CFR 816.95.

(b) For all other surface mining activities the application shall contain an air pollution control plan which includes the following:

(1) An air quality monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices under paragraph (b) (2) of this section to comply with applicable Federal and State air quality standards; and

(2) A plan for fugitive dust control practices, as required under 30 CFR 816.95

§ 780.16 Fish and wildlife plan.

(a) Each application shall contain a fish and wildlife plan, consistent with 30 CFR 816.97 which provides:

(1) A statement of how the plan will minimize disturbances and adverse impacts on fish and wildlife and related environmental values during surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. The plan shall cover the mine plan area and portions of adjacent areas as determined by the regulatory authority pursuant to § 779.20(c).

(2) If the applicant states that it will not be practicable, in accordance with paragraph (a) (1) of this section, to achieve a condition which clearly shows a trend toward enhancement of fish and wildlife resources at the time revegetation has been successfully completed under 30 CFR 816.111-816.117, a statement shall be provided which establishes, to the satisfaction of the regulatory authority, why it is not practicable to achieve such a condition.

(b) A statement explaining how the applicant will utilize impact control measures, management techniques, and monitoring methods to protect or enhance the following, if they are to be affected by the proposed activities:

(1) Threatened or endangered species of plants or animals listed by the Secretary under the Endangered Spe-

cies Act of 1973, as amended (16 U.S.C. 1531 et seq.) and their critical habitats;

(2) Species such as eagles, migratory birds or other animals protected by State or Federal law, and their habitats; or other species identified through the consultation process pursuant to § 779.20; or

(3) Habitats of unusually high value for fish and wildlife, such as wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas:

§ 780.18 Reclamation plan: General requirements.

(a) Each application shall contain a plan for reclamation of the lands within the proposed permit area, showing how the applicant will comply with section 515 of the Act, Subchapter K of this chapter, and the environmental protection performance standards of the regulatory program. The plan shall include, at a minmum, all information required under 30 CFR 780.18-780.37.

(b) Each plan shall contain the following information for the proposed permit area—

(1) A detailed timetable for the completion of each major step in the reclamation plan;

(2) A detailed estimate of the cost of reclamation of the proposed operations required to be covered by a performance bond under Subchapter J of this chapter, with supporting calculations for the estimates;

(3) A plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 816.101-816.106;

(4) A plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of 30 CFR 816.21-816.25.

(5) A plan for revegetation as required in 30 CFR 816.111-816.117, including, but not limited to, descriptions of the—

(i) Schedule of revegetation;

(ii) Species and amounts per acre of seeds and seedlings to be used;

(iii) Methods to be used in planting and seeding;

(iv) Mulching techniques;

(v) Irrigation, if appropriate, and pest and disease control measures, if any; and

(vi) Measures proposed to be used to determine the success of revegetation as required in 30 CFR 816.116.

(vii) A soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation.

(6) A description of the measures to be used to maximize the use and conservation of the coal resource as required in 30 CFR 816.59;

(7) A description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with 30 CFR 816-89 and 816.103 and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) A description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case, or manage exploration holes, other bore holes, wells, and other openings within the proposed permit area, in accordance with 30 CFR 816.13-816.15; and

(9) A description of steps to be taken to comply with the requireemnts of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air and water quality laws and regulations and health and safety standards.

§ 780.21 Reclamation plan: Protection of hydrologic balance.

(a) Each plan shall contain a detailed description, with appropriate maps and cross section drawings, of the measures to be taken during and after the proposed surface mining activities, in accordance with 30 CFR Part 816, to ensure the protection of—

(1) The quality of surface and ground water systems, both within the proposed mine plan and adjacent areas, from the adverse effects of the proposed surface mining activities;

(2) The rights of present users of surface and ground water; and

(3) The quantity of surface and ground water both within the proposed mine plan area and adjacent area from adverse effects of the proposed surface mining activities, or to provide alternative sources of water in accordance with 30 CFR 779.17 and 816.54, where the protection of quantity cannot be ensured.

(b) The description shall include—

(1) A plan for the control, in accordance with 30 CFR 816, of surface and ground water drainage into, through and out of the proposed mine plan area;

(2) A plan for the treatment, where required under Subchapter K of this Chapter and the regulatory program, of surface and ground water drainage from the area to be disturbed by the proposed activities, and proposed quantitative limits on pollutants in discharges sub-

ject to 30 CFR 816.42, according to the more stringent of the following:

(i) Subchapter K of this chapter and the regulatory program; or

(ii) Other applicable State and Federal laws.

(3) A plan for the restoration of the approximate recharge capacity of the mine plan area in accordance with 30 CFR 816.51; and

(4) A plan for the collection, recording, and reporting of ground and surface water quality and quantity data, according to 30 CFR 816.52.

(c) The description shall include a determination of the probable hydrologic consequences of the proposed surface mining activities, on the proposed mine plan area and adjacent area, with respect to the hydrologic regime and the quantity and quality of water in surface and ground water systems under all seasonal conditions, including the contents of dissolved and total suspended solids, total iron, pH, total manganese, and other parameters required by the regulatory authority.

§ 780.23 Reclamation plan: Postmining land uses.

(a) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land within the proposed permit area including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land use policies and plans. This description shall explain—

(1) How the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(2) Where range or grazing is the proposed postmining use, the detailed management plans to be implemented;

(3) Where a land use different from the pre-mining land use is proposed, all materials needed for approval of the alternative use under 30 CFR 816.133; and

(4) The consideration which has been given to making all of the proposed surface mining activities consistent with surface owner plans and applicable State and local land use plans and programs.

(b) The description shall be accompanied by a copy of the comments concerning the proposed use by the legal or equitable owner of record of the surface of the proposed permit area and the State and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

§ 780.25 Reclamation plan: Ponds, impoundments, banks, dams, and embankments.

(a) *General.* Each application shall include a general plan for each proposed sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed mine plan area.

(1) Each general plan shall—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or by a professional geologist with assistance from experts in related fields such as land surveying and landscape architecture;

(ii) Contain a description, map, and cross section of the structure and its location;

(iii) Contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(iv) Contain a survey describing the potential effect on the structure from subsidence of the subsurface strata

resulting from past underground mining operations if underground mining has occurred; and

(v) Contain a certification statement which includes a schedule setting forth the dates that any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority. The regulatory authority shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Each detailed design plan for a structure that meets or exceeds the size or other criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a), shall—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(ii) Include any geotechnical investigation, design, and construction requirements for the structure;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for a structure that does not meet the size or other criteria of 30 CFR 77.216 (a) shall—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer or registered land surveyor except that all coal processing waste dams and embankments covered by 30 CFR 816.91-816.93 shall be certified by a qualified registered professional engineer;

(ii) Include any design and construction requirements for the structure, including any required geotechnical information;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Sedimentation ponds.* Sedimentation ponds, whether temporary or permanent, shall be designed in compliance with the requirements of 30 CFR 816.46. Any sedimentation pond or earthen structure which will remain on the proposed mine plan area as a permanent water impoundment shall also be designed to comply with the requirements of 30 CFR 816.49. Each plan shall, at a minimum, comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2.

(c) *Permanent and temporary impoundments.* Permanent and temporary impoundments shall be designed to comply with the requirements of 30 CFR 816.49. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2.

(d) *Coal processing waste banks.* Coal processing waste banks shall be designed to comply with the requirements of 30 CFR 816.81-816.85.

(e) *Coal processing waste dams and embankments.* Coal processing waste dams and embankments shall be designed to comply with the requirements of 30 CFR 816.91-816.93. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the struc-

tural competence of the foundation which will support the proposed dam or embankment structure and the impoundment material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) The number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.

(2) The character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site shall be considered.

(3) All springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan.

(4) Consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) If the structure is 20 feet or higher or impounds more than 20 acres-feet, each plan under Paragraphs (b), (c), and (e) of this Section shall include a stability analysis of each structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

§ 780.27 Reclamation plan: Surface mining near underground mining.

For surface mining activities within the proposed permit area to be conducted within 500 feet of an under-

ground mine, the application shall describe the measures to be used to comply with 30 CFR 816.79.

§ 780.29 Diversions.

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with 30 CFR 816.43-816.44.

§ 780.31 Protection of public parks and historic places.

For any public parks or historic places that may be adversely affected by the proposed operations, each plan shall describe the measures to be used to minimize or prevent these impacts and to obtain approval of the regulatory authority and other agencies as required in 30 CFR 761.12(f).

§ 780.33 Relocation or use of public roads.

Each application shall describe, with appropriate maps and cross-sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under 30 CFR 761.12(d), the applicant seeks to have the regulatory authority approve—

(a) Conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 780.35 Disposal of excess spoil.

(a) Each application shall contain descriptions, including appropriate maps and cross section drawings, of the proposed disposal site and design of the spoil disposal structure according to 30 CFR 816.71-816.74. These plans shall describe the geotechnical investigation, design, construction, operation, maintenance, and removal, if appropriate, of the site and structures.

(b) Each application shall contain the results of a geotechnical investigation of the proposal disposal site, including the following:

(1) The character of bedrock and any adverse geologic conditions in the disposal area.

(2) A survey identifying all springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the disposal site;

(3) A survey of the potential effects of subsidence of the subsurface strata due to past and future mining operations;

(4) A technical description of the rock materials to be utilized in the construction of those disposal structures containing rock chimney cores or underlain by a rock drainage blanket; and

(5) A stability analysis including, but not limited to, strength parameters, pore pressures and long-term seepage conditions. These data shall be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods.

(c) If, under 30 CFR 816.71(i), rock-toe buttresses or key-way cuts are required, the application shall include the following:

(1) The number, location, and depth of borings or test pits which shall be determined with respect to the size of the spoil disposal structure and subsurface conditions; and

(2) Engineering specifications utilized to design the rock-toe buttress or key-way cuts which shall be determined in accordance with paragraph (b)(5) of this Section.

§ 780.37 Transportation facilities.

Each application shall contain a detailed description of each road, conveyor, or rail system to be constructed, used, or maintained within the proposed permit area. The description shall include a map, appropriate cross sections, and the following:

(a) Specifications for each road width, road gradient, road surface, road cut, fill embankment, culvert, bridge, drainage ditch, and drainage structure.

(b) A report of appropriate geotechnical analysis, where approval of the regulatory authority is required for alternative specifications, or for steep cut slopes under 30 CFR 816.150(d), 816.152(c), 816.160(d) or 816.162 (c).

(c) A description of measures to be taken to obtain approval of the regulatory authority for alterations or relocation of a natural drainageway under 30 CFR 816.153(d), 816.163(d) or 816.173(c).

(d) A description of measures, other than use of a rock headwall, to be taken to protect the inlet end of a ditch relief culvert, for approval by the regulatory authority under 30 CFR 816.153(c)(2)(vi) and 816.163 (c)(2)(vi).

(e) Each plan shall contain a general description of each road, conveyor, or rail system to be constructed, used, or maintained within the proposed mine plan area.

PART 782—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION

Sec.

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782.11 Applicability.

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782.14 Compliance information.

782.15 Right of entry and operation information.

782.16 Relationship to areas designated unsuitable for mining.

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782.20 Identification of location of public office for filing of application.

782.21 Newspaper advertisement and proof of publication.

AUTHORITY: Secs. 102, 201, 501, 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, 516, and 522 of Pub. L. 95-87, 91 Stat. 44 (30 U.S.C. Secs. 1201, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1266, 1272).

SOURCE: 44 FR 15361, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 782.13, 782.14, 782.15, 782.16, 782.17, 782.18,

782.19, 782.20, and 782.21 have been approved by the U.S. General Accounting Office under number B-190462 (R0607).

§ 782.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions regarding the legal, financial, compliance and general information that must be contained in permit applications for underground mining activities.

§ 782.2 Objectives.

The objective of this Part is to ensure that all relevant information on the ownership and control of persons who conduct underground mining activities, the ownership and control of the property to be affected by the operations, the compliance status and history of those persons, and other important information is provided in the application to the regulatory authority.

§ 782.4 Responsibility.

It is the responsibility of the permit applicant to provide to the regulatory authority all of the information required by this Part.

§ 782.11 Applicability.

This Part applies to any person who applies for a permit to conduct underground mining activities.

§ 783.13 Identification of interests.

(a) Each application shall contain the names and addresses of—

(1) The permit applicant, including his or her telephone number;

(2) Every legal or equitable owner of record of the areas to be affected by surface operations and facilities

and every legal or equitable owner of record of the coal to be mined;

(3) The holders of record of any leasehold interest in areas to be affected by surface operations or facilities and the holders of record of any leasehold interest in the coal to be mined;

(4) Any purchaser of record under a real estate contract of areas to be affected by surface operations and facilities and any purchaser of record under a real estate contract of the coal to be mined;

(5) The operator, if the operator is a person different from the applicant, including his or her telephone number; and

(6) The resident agent of the applicant who will accept service of process, including his or her telephone number.

(b) Each application shall contain a statement of whether the applicant is a corporation, partnership, single proprietorship, association, or other business entity. For businesses other than single proprietorships, the application shall contain the following information, where applicable:

(1) Names and addresses of every officer, partner, director, or other person performing a function similar to a director of the applicant;

(2) Name and address of any person who is a principal shareholder of the applicant; and

(3) Names under which the applicant, partner, or principal shareholder previously operated a surface coal mining operation in the United States within the 5 years preceding the date of application.

(c) If any owner, holder, purchaser, or operator, identified under paragraph (a) of this section, is a business

entity other than a single proprietor, the application shall contain the names and addresses of their respective principals, officers, and resident agents.

(d) Each application shall contain a statement of any current or previous coal mining permits in the United States held by the applicant subsequent to 1970 and by any person identified in paragraph (b)(3) of this Section and of any pending permit application to conduct surface coal mining and reclamation operations in the United States. The information shall be listed by permit or application number and identify the regulatory authority for each of those coal mining operations.

(e) Each application shall contain the names and addresses of the owners of record of all surface and subsurface areas contiguous to any part of the proposed permit area.

(f) Each application shall contain the name of the proposed mine and the Mine Safety and Health Administration identification number for the mine and all sections, if any.

(g) Each application shall contain a statement of all lands, interests in lands, options, or pending bids on interests held or made by the applicant for lands which are contiguous to the area to be covered by the permit.

§ 782.14 Compliance information.

Each application shall contain—

(a) A statement of whether the applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant has:

(1) Had a Federal or State mining permit suspended or revoked in the last 5 years; or,

(2) Forfeited a mining bond or similar security deposited in lieu of bond.

(b) If any such suspension, revocation, or forfeiture has occurred, a statement of the facts involved, including:

(1) Identification number and date of issuance of the permit or date and amount of bond or similar security;

(2) Identification of the authority that suspended or revoked a permit or forfeited a bond and the stated reasons for that action;

(3) The current status of the permit, bond, or similar security involved;

(4) The date, location, and type of any administrative or judicial proceedings initiated concerning the suspension, revocation, or forfeiture; and

(5) The current status of these proceedings.

(c) A listing of each violation notice received by the applicant in connection with any surface coal mining operation during the 3-year period before the application date, for violations of any law, rule, or regulation of the United States, or of any State law, rule, or regulation enacted pursuant to Federal law, rule, or regulation, or of any provision of the Act pertaining to air or water environmental protection. The application shall also contain a statement regarding each violation notice, including—

(1) The date of issuance and identity of the issuing regulatory authority, department, or agency;

(2) A brief description of the particular violation alleged in the notice;

(3) The date, location, and type of any administrative or judicial proceedings initiated concerning the violation, including, but not limited to, proceedings initiated by the applicant to obtain administrative or judicial review of the violations;

(4) The current status of the proceedings and of the violation notice; and

(5) The actions, if any, taken by the applicant to abate the violation.

§ 782.15 Right of entry and operation information.

(a) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin underground mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) For underground mining activities where the associated surface operations involve the surface mining of coal and the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide, for lands to be affected by those operations within the permit area—

(1) A copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or

(2) A copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(3) If the conveyance does not expressly grant the right to extract coal by surface mining methods, documentation that under the applicable State law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this Section shall be construed to afford the regulatory authority the authority to adjudicate property title disputes.

§ 782.16 Relationship to areas designated unsuitable for mining.

(a) Each application shall contain a statement of available information on whether the proposed permit area is within an area designated unsuitable for underground mining activities under 30 CFR 764 and 765 or under study for designation in and administrative proceeding initiated under those Parts.

(b) If an applicant claims the exemption in 30 CFR 786.19(d)(2), the application shall contain information supporting the applicant's assertion that it made substantial legal and financial commitments before January 4, 1977, concerning the proposed underground mining activities.

(c) If an applicant proposes to conduct or locate surface operations or facilities within 300 feet of an occupied dwelling, the application shall include the waiver of the owner of the dwelling as required in 30 CFR 761.12(e).

§ 782.17 Permit term information.

(a) Each application shall state the anticipated or actual starting and termination date of each phase of the underground mining activities and the anticipated number of acres of surface lands to be affected, and the horizontal and vertical extent of proposed underground mine workings, for each phase of mining and over the total life of the permit.

(b) If the applicant proposes to conduct the underground mining activities in excess of 5 years, the application shall contain the information needed for the showing required under 30 CFR 786.25(a).

§ 728.18 Personal injury and property damage insurance information.

Each application shall contain either a certificate of liability insurance or evidence that the self-insurance requirements in 30 CFR 806.14 are satisfied.

§ 782.19 Identification of other licenses and permits.

Each application shall contain a list of all other licenses and permits needed by the applicant to conduct the proposed underground mining activities. This list shall identify each license and permit by—

(a) Type of permit or license;

(b) Name and address of issuing authority;

(c) Identification numbers of applications for those permits or licenses or, if issued, the identification numbers of the permits or licenses; and

(d) If a decision has been made, the date of approval or disapproval by each issuing authority.

§ 728.20 Identification of location of public office for filing of application.

Each application shall identify, by name and address, the public office where the applicant will simultaneously file a copy of the application for public information under 30 CFR 786.11(d).

§ 782.21 Newspaper advertisement and proof of publication.

A copy of the newspaper advertisement of the application and proof of publication of the advertisement shall be filed with the regulatory authority and made a part of the complete application not later than 4 weeks after the last date of publication required under 30 CFR 786.11 (a).

PART 783—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

Sec.

783.1 Scope.

783.2 Objectives.

783.4 Responsibilities.

783.11 General requirements.

783.12 General environmental resources information.

783.13 Description of hydrology and geology: General requirements.

783.14 Geology description.

783.15 Ground water information.

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783.17 Alternative water supply information.

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783.19 Vegetation information.

783.20 Fish and wildlife resources information.

783.21 Soil resources information.

783.22 Land use information.

783.24 Maps: General requirements.

783.25 Cross sections, maps, and plans.

783.27 Prime farmland investigation.

AUTHORITY: Secs. 102, 201, 501, 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, 516, 517, and 522, Pub. L. 95-87, 91 Stat. 445. (30 U.S.C. 1201, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1266, 1267, and 1272).

SOURCE: 44 FR 15363, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 783.11, 783.12, 783.13, 783.14, 783.15, 783.16, 783.17, 783.18, 783.19, 783.20, 783.21, 783.22, 783.22, 783.24, and 783.25 have been approved by the U.S. General Accounting Office under number B-190462 (R0608).

§ 783.1 Scope.

This part establishes the minimum requirements for the Secretary's approval of regulatory program provisions for the environmental resources contents of applications for permits for underground mining activities.

§ 783.2 Objectives.

The objectives of this part are to ensure that each application provides to the regulatory authority a complete and accurate description of the environmental resources that may be impacted or affected by proposed underground mining activities.

§ 783.4 Responsibilities.

(a) It is the responsibility of the applicant to provide, except where specifically exempted in this part, all information required by this part in the application.

(b) It is the responsibility of State and Federal Government agencies to provide information for applications as specifically required by this part.

§ 783.11 General requirements.

Each permit application shall include a description of the existing, premining environmental resources within the proposed mine plan area and adjacent areas that may be affected or impacted by the proposed underground mining activities.

§ 783.12 General evironmental resources information.

Each application shall describe and identify—

(a) The size, sequence, and timing of the subareas of the mine plan area for which it is anticipated that individual permits for mining will be requested over the estimated total life of the proposed underground mining activities; and

(b) The nature of cultural and historic resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed mine plan and adjacent areas. The description shall be based on all available information, including, but not limited to, data of State and local archeological, historic, and cultural preservation agencies.

§ 783.13 Description of hydrology and geology: General requirements.

(a) Each application shall contain a description of the geology, hydrology, and water quality and quantity of all lands within the proposed mine plan area, the adjacent area, and the general area. The description shall include information on the characteristics of all surface and ground waters within the general area, and any water which will flow into or receive discharges of water from the general area. The description shall be prepared according to §§ 783.13—783.16 and conform to the following:

(1) Information on hydrology, water quality and quantity, and geology related to hydrology of areas outside the proposed mine plan area and within the general area shall be provided by the regulatory authority, to the extent that this data is available from an appropriate Federal or State agency.

(2) If this information is not available from those agencies, the applicant may gather and submit this infor-

mation to the regulatory authority as part of the permit application.

(3) The permit shall not be approved by the regulatory authority until this information is made available in the application.

(b) The use of modeling techniques may be included as part of the permit application, but the same surface and ground water information may be required for each site as when models are not used.

§ 783.14 Geology description.

(a) The description shall include a general statement of the geology within the proposed mine plan area, down to and including the first aquifer to be affected below the lowest coal seam to be mined. The geology for areas proposed to be affected by surface operations and facilities, those surface lands overlying coal to be mined, and the coal to be mined shall be separately described, as follows:

(1) Geology of the strata down to and including the stratum immediately below any coal seam to be mined shall be described for those areas to be affected by surface operations or facilities, including the following data resulting from analyses of test borings, core samplings, or outcrop samples—

(i) The location of areas where subsurface water will be exposed at the face-up area;

(ii) The logs of drill holes showing the lithologic characteristics of the strata to be affected;

(iii) The physical properties of each stratum within the overburden, including compaction and erodibility; and,

(iv) Chemical analyses of each stratum to be affected, including the stratum immediately below the lowest coal

seam to be mined, to identify, at a minimum, those horizons which contain potential acid-forming, toxic-forming, or alkalinity-producing materials.

(2) The geology for those surface lands within the proposed mine plan area which are underlain by the coal seam to be extracted and the geology of the coal seam itself, including—

(i) Location of subsurface water, if encountered;

(ii) The depth, classification, and geologic structure of the overburden;

(iii) Pyritic content and potential alkalinity of the stratum immediately above and below the coal seam to be mined and the clay content of the stratum immediately below the coal seam to be mined; and

(iv) Pyrite, marcasite, and sulfur content of the coal seam.

(b) An applicant may request that the requirements of paragraph (a)(1) of this section be waived by the regulatory authority. The waiver may be granted only if the regulatory authority makes a written determination that the statement required is unnecessary because other equivalent information is accessible to it in a satisfactory form.

NOTE: A document published at 44 FR 77455, Dec. 31, 1979, temporarily suspended § 783.14(a)(1). The regulation is suspended insofar as it requires a geologic description of the strata down to and including the strata immediately below any coal seam for areas to be affected only by "surface operations and facilities," where no removal of overburden down to the level of the coal seam will occur.

§ 783.15 Ground water information.

(a) The application shall contain a description of the ground water hydroolgy for the proposed mine plan and adjacent area, including, at a minimum—

(1) The depth below the surface and the horizontal extent of the water table and aquifers;

(2) The lithology and thickness of the aquifers;

(3) The uses of the water in the aquifers and water table; and

(4) The quality of subsurface water, if encountered.

(b) The application shall contain additional information which describes the recharge, storage, and discharge characteristics of aquifers and the quality and quantity of ground water, according to the parameters and in the detail required by the regulatory authority.

§ 783.16 Surface water information.

(a) Surface water information shall be described, including the name of the watershed which will receive water discharges, the location of all surface water bodies such as streams, lakes, ponds, and springs, the locations of any water discharge into any surface body of water, and descriptions of surface drainage systems sufficient to identify, in detail, the seasonal variations in water quantity and quality within the proposed mine plan and adjacent areas.

(b) Surface water information shall include:

(1) Minimum, maximum, and average discharge conditions, which identify critical low flows and peak discharge rates of streams sufficient to identify seasonal variations; and

(2) Water quality data to identify the characteristics of surface waters in, discharging into, or which will re-

ceive flows of surface or ground water from the affected area within the proposed mine plan area, sufficient to identify seasonal variations, showing—

(i) Total dissolved solids in milligrams per liter;

(ii) Total suspended solids in milligrams per liter;

(iii) Acidity;

(iv) pH in standard units;

(v) Total and dissolved iron in milligrams per liter;

(vi) Total manganese in milligrams per liter; and

(vii) Such other information as the regulatory authority determines is relevant.

783.17 Alternative water supply information.

The application shall identify the extent to which the proposed underground mining activities may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed mine plan or adjacent area for domestic, agricultural, industrial, or other legitimate use. If contamination, diminution, or interruption may result, then the description shall identify the alternative sources of water supply that could be developed to replace the existing sources.

§ 783.18 Climatological information.

(a) When requested by the regulatory authority, the application shall contain a statement of the climatological factors that are representative of the proposed mine plan area, including—

(1) The average seasonal precipitation;

(2) The average direction and velocity of prevailing winds; and

(3) Seasonal temperature ranges.

(b) The regulatory authority may request such additional data as deemed necessary to ensure compliance with the requirements of this subchapter.

§ 783.19 Vegetation information.

(a) The permit application shall, if required by the regulatory authority, contain a map that delineates existing vegetative types and a description of the plant communities within the area affected by surface operations and facilities and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under 30 CFR 779.20.

§ 783.20 Fish and Wildlife resources information.

(a) Each application shall include a study of fish and wildlife and their habitats within the proposed mine plan area where surface operations will be conducted or facilities located and the portions of the adjacent areas where effects on such resources may reasonably be expected to occur.

(b) Prior to initiating such studies, the applicant shall contact the regulatory authority to determine what fish and wildlife resources information will be required.

(c) The regulatory authority, in consultation with the appropriate State and Federal fish and wildlife management, conservation, or land management agencies having responsibilities for fish or wildlife or their habitats, shall determine the level of detail and the areas of such studies according to:

(1) Published data and other information.

(2) Site specific information obtained by the applicant, and

(3) Written guidance obtained from agencies consulted.

§ 783.21 Soil resources information.

(a) The applicant shall provide adequate soil survey information on those portions of the permit area to be affected by surface operations or facilities consisting of the following:

(1) A map delineating different soils;

(2) Soil identification;

(3) Soil description; and

(4) Present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall provide results of the analyses, trials and tests required under 30 CFR 817.22.

§ 783.22 Land-use information.

(a) The application shall contain a statement of the condition, capability and productivity of the land which will be affected by surface operations and facilities within the proposed permit area, including—

(1) A map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed within 5 years before the anticipated date of beginning the proposed operations, the historic use of the land shall also be described.

(2) A narrative of land capability and productivity, which analyzes the land-use description under paragraph (a) of this Section in conjunction with other en-

vironmental resources information required under this Part. The narrative shall provide analyses of:

(i) The capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the area proposed to be affected by surface operations or facilities; and

(ii) The productivity of the area proposed to be affected by surface operations and facilities before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, State agricultural universities or appropriate State natural resources or agricultural agencies.

(b) The application shall state whether the proposed mine plan area has been previously mined, and, if so, the following information, if available—

(1) The type of mining method used;

(2) The coal seams or other mineral strata mined;

(3) The extent of coal or other minerals removed;

(4) The approximate dates of past mining; and

(5) The uses of the land preceding mining.

(c) The application shall contain a description of the existing land uses and land use classifications under local law, if any, of the proposed mine plan and adjacent areas.

§ 783.24 Maps: General requirements.

The permit application shall include maps showing:

(a) All boundaries of lands and names of present owners of record of record of those lands, both surface and sub-surface, included in or contiguous to the permit area;

(b) The boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin underground mining activities;

(c) The boundaries of all areas proposed to be affected over the estimated total life of the underground mining activities, with a description of size, sequence and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(d) The location of all buildings in and within 1000 feet of the proposed permit area, with identification of the current use of the buildings;

(e) The location of surface and subsurface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to, major electric transmission lines, pipelines, and agricultural drainage tile fields;

(f) The location and boundaries of any proposed reference areas for determining the success of revegetation;

(g) The locations of water supply intakes for current users of surface waters flowing into, out, and within a hydrologic area defined by the regulatory authority, and those surface waters which will receive discharges from affected areas in the proposed mine plan area;

(h) Each public road located in or within 100 feet of the proposed permit area;

(i) The boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the mine plan and adjacent areas.

(j) Each public or private cemetery or Indian burial ground located in or within 100 feet of the proposed permit area;

(k) Any land within the proposed mine plan area and adjacent area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and

(l) The relevant information required by the regulatory authority.

[44 FR 15363, Mar. 13, 1979; 44 FR 49685, Aug. 24, 1979]

§ 783.25 Cross sections, maps, and plans.

The application shall include cross sections, maps, and plans showing—

(a) Elevations and locations of test borings and core samplings;

(b) Elevations and locations of monitoring stations used to gather data on water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application.

(c) Nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(d) All coal crop lines and the strike and dip of the coal to be mined within the proposed mine plan area;

(e) Location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed mine plan and adjacent areas;

(f) Location and extent of sub-surface water, if encountered, within the proposed mine plan or adjacent areas, including, but not limited to a real and vertical distribution of aquifers, and portrayal of seasonal differences of head in different aquifers on cross-sections and contour maps;

(g) Location of surface water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and

irrigation ditches within the proposed mine plan and adjacent areas;

(h) Location and extent of existing or previously surface-mined areas within the proposed mine plan area;

(i) Location and dimensions of existing areas of spoil, waste, coal development waste, and non-coal waste disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area;

(j) Location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the mine plan area and adjacent areas;

(k) Sufficient slope measurements to adequately represent the existing land surface configuration of the area affected by surface operations and facilities, measured and recorded according to the following:

(1) Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed or, where this is impractical, at locations specified by the regulatory authority.

(2) Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances, or any other distance determined by the regulatory authority to be representative of the premining configuration of the land.

(3) Slope measurements shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed.

(l) Maps, plans and cross sections included in a permit application and required by this section shall be prepared by, or under the direction of and certified by a qualified

registered professional engineer or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture and shall be updated as required by the regulatory authority.

§ 783.27 Prime farmland investigation.

(a) The applicant shall conduct a pre-application investigation of the area proposed to be affected by surface operations or facilities to determine whether lands within the area may be prime farmland.

(b) Land shall not be considered prime farmland where the applicant can demonstrate one or more of the following:

(1) The land has not been historically used as cropland;

(2) The slope of the land is 10 percent or greater;

(3) The land is not irrigated or naturally subirrigated, has no developed water supply that is dependable and of adequate quality, and the average annual precipitation is 14 inches or less;

(4) Other factors exist, such as a very rocky surface, or the land is frequently flooded during the growing season more often than once in 2 years and the flooding has reduced crop yields; or

(5) On the basis of a soil survey of the lands within the mine plan area there are no soil map units that have been designated prime farmland by the U.S. Soil Conservation Service.

(c) If the investigation establishes that the lands are not prime farmland, the applicant shall submit with the permit application a request for a negative determination which shows that the land for which the negative determination is sought meets one or more of the criteria in paragraph (b) of this section.

(d) If the investigation indicates that lands within the proposed area to be affected by surface operations and facilities may be prime farmlands, the applicant shall contact the U.S. Soil Conservation Service to determine if these lands have a soil survey and whether the applicable soil map units have been designated prime farmlands. If no such soil survey has been made for these lands, the applicant shall cause such a survey to be made.

(1) When a soil survey as required in paragraph (d) of this section contains soil map units which have been designated as prime farmlands, the applicant shall submit an application, in accordance with 30 CFR 785.17 for such designated land.

(2) When a soil survey as required in paragraph (d) of this section contains soil map units which have not been designated, after review by the U.S. Soil Conservation Service, as prime farmland, the applicant shall submit a request for negative determination for non-designated land with the permit application establishing compliance with paragraph (b) of this section.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

Sec.

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784.26 Air pollution control plan.

AUTHORITY: Secs. 102, 201, 501(b), 503, 504, 506, 507, 508, 509, 510, 511, 513, 514, 515, 516, 517, and 522, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201, 1211, 1251, 1253, 1254, 1256, 1257, 1258, 1259, 1260, 1261, 1263, 1264, 1265, 1266, 1267, 1267 and 1272).

SOURCE: 44 FR 15366, Mar. 13, 1979, unless otherwise noted.

NOTE: The reporting requirements contained in 30 CFR 784.11, 784.12, 784.13, 784.14, 784.15, 784.16, 784.17, 784.18, 784.19, 784.20, 784.21, 784.22, 784.23, 784.24, 784.25, and 784.26 have been approved by the U.S. General Accounting Office under number B-190462 (R0609).

§ 784.1 Scope.

This part provides the minimum requirements for the Secretary's approval of regulatory program provisions for the mining operations and reclamation plans portions of applications for permits for underground mining activities, except to the extent that different requirements for those plans are established under 30 CFR Part 785.

§ 784.2 Objectives.

The objectives of this part are to ensure that the regulatory authority is provided with comprehensive and reliable information on proposed underground mining activities, and to ensure that those activities are allowed to be conducted only in compliance with the Act, this chapter, and the regulatory program.

§ 784.4 Responsibilities.

(a) It is the responsibility of the applicant to provide to the regulatory authority all of the information required by this part, except where specifically exempted in this part.

(b) It is the responsibility of State and Federal governmental agencies to provide information to the regulatory authority where specifically required in this part.

§ 784.11 Operation plan: General requirements.

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed mine plan area, including, as a minimum, the following:

(a) A narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(b) A narrative explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facility is necessary for postmining land use as specified in § 817.133)—

(1) Dams, embankments, and other impoundments;

(2) Overburden and topsoil handling and storage areas and structures;

(3) Coal removal, handling, storage, cleaning, and transportation areas and structures;

(4) Spoil, coal processing waste, mine development waste, and non-coal waste removal, handling, storage, transportation, and disposal areas and structures;

(5) Mine facilities; and

(6) Water pollution control facilities.

§ 784.12 Operation plan: Existing structures.

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include:

(1) Location;

(2) Plans of the structure which describe its current condition;

(3) Approximate dates on which construction of the existing structure was begun and completed; and

(4) A showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of Subchapter K (Permanent Program Standards) of this chapter or, if the structure does not meet the performance standards of Subchapter K of this chapter, a showing whether the structure meets the performance standards of Subchapter B (Interim Program Standards) of this chapter.

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include—

(1) Design specifications for the modification or reconstruction of the structure to meet the design and performance standards of Subchapter K of this chapter;

(2) A construction schedule which shows dates for beginning and completing interim steps and final reconstruction;

(3) Provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of Subchapter K of this chapter are met; and

(4) A showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

§ 784.13 Reclamation plan: General requirements.

(a) Each application shall contain a plan for the reclamation of the lands within the proposed permit area, showing how the applicant will comply with sections 515 and 516 of the Act, Subchapter K of this chapter, and the environmental protection performance standards of the regulatory program. The plan shall include, at a minimum, all information required under 30 CFR 784.13-784.26.

(b) Each plan shall contain the following information for the proposed permit area;

(1) A detailed timetable for the completion of each major step in the reclamation plan;

(2) A detailed estimate of the cost of the reclamation of the proposed operations required to be covered by a performance bond under Subchapter J of this Chapter, with supporting calculations for the estimates;

(3) A plan for backfilling, soil stabilization, compacting and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with 30 CFR 817.101-817.106;

(4) A plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of 30 CFR 817.21-817.25;

(5) A plan for revegetation as required in 30 CFR 817.111-817.116, including, but not limited to, descriptions of the—

(i) Schedule of revegetation;

(ii) Species and amounts per acre of seeds and seedlings to be used;

(iii) Methods to be used in planting and seeding;

(iv) Mulching techniques;

(v) Irrigation, if appropriate, and pest and disease control measures, if any;

(vi) Measures proposed to be used to determine the success of revegetation as required in 30 CFR 817.116; and,

(vii) A soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation.

(6) A description of the measures to be used to maximize the use and conservation of the coal resource as required in 30 CFR 817.59;

(7) A description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with 30 CFR 817.89 and 817.103 and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) A description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case or manage exploration holes, other bore holes, wells and other openings within the proposed permit area, in accordance with 30 CFR 817.13-817.15; and

(9) A description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air and water quality laws and regulations and health and safety standards.

[44 FR 15366 Mar. 13, 1979; 44 FR 49686, Aug. 24, 1979]

§ 784.14 Reclamation plan: Protection of hydrologic balance.

(a) Each plan shall contain a detailed description, with appropriate maps and cross-section drawings, of the measures to be taken during and after the proposed underground mining activties, in accordance with 30 CFR Part 817, to ensure the protection of:

(1) The quality of surface and ground water, both within the proposed mine plan area and adjacent areas, from adverse effects of the proposed underground mining activities;

(2) The rights of present users to surface and ground water;

(3) The quantity of surface ground water both within the proposed mine plan and adjacent area from adverse effects of the proposed underground mining activities, or to provide alternative sources of water, in accordance with 30 CFR 783.17 and 817.54, where the protection of quantity cannot be ensured; and

(4) Water quality by locating openings for mines in accordance with 30 CFR 817.50.

(b) The description shall include—

(1) A plan for the control, in accordance with 30 CFR Part 817, of surface and ground water drainage into, through, and out of the proposed mine plan area;

(2) A plan for the treatment, where required under Subchapter K of this chapter and the regulatory program, and surface and ground water drainage from the area to be affected by the proposed activities, and proposed quantitative limits on pollutants in discharges subject to 30 CFR 817.42, according to the more stringent of the following:

(i) Subchapter K of this chapter and the regulatory program; or

(ii) Other applicable State and Federal laws.

(3) A plan for the collection, recording, and reporting of ground and surface water quality and quantity data, according to 30 CFR 817.52.

(c) The description shall include a determination of the probable hydrologic consequences of the proposed underground mining activities, on the proposed mine plan area and adjacent area, with respect to the hydrologic regime and the quantity and quality of water in surface and ground water systems under all seasonal conditions, including the contents of dissolved and total suspended solids, total iron, pH, total manganese, and other parameters required by the regulatory authority.

(d) Each plan shall contain a detailed description, with appropriate drawings, of permanent entry seals and down-slope barriers designed to ensure stability under anticipated hydraulic heads developed while promoting mine inundation after mine closure for the proposed mine plan area.

§ 784.15 Reclamation plan: Postmining land uses.

(a) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land to be affected within the proposed permit area by surface operations or facilities, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land use policies and plans. This description shall explain—

(1) How the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(2) Where a land use different from the pre-mining land use is proposed, all materials needed for approval of the alternative use under 30 CFR 817.133; and

(3) The consideration given to making all of the proposed underground mining activities consistent with surface plans and applicable State and local land use plans and programs.

(b) The description shall be accompanied by a copy of the comments concerning the proposed use from the legal or equitable owner of record of the surface areas to be affected by surface operations or facilities within the proposed permit area and the State and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

§ 784.16 Reclamation plan: Ponds, impoundments, banks, dams, and embankments.

(a) *General.* Each application shall include a general plan for each proposed sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed mine plan area.

(1) Each general plan shall—

(i) Be prepared by, or under the direction of, and certified by, a qualified registration professional engineer or by a professional geologist with assistance from experts in related fields such as land surveying and landscape architecture;

(ii) Contain a description, map, and cross section of the structure and its location;

(iii) Contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(iv) Contain a survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operations if underground mining has occurred; and

(v) Contain a certification statement which includes a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the regulatory authority. The regulatory authority shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Each detailed design plan for a structure that meets or exceeds the size or other criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a) shall—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(ii) Include any geotechnical investigation, design, and construction requirements for the structure;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for a structure that does not meet the size or other criteria of 30 CFR 77.216 (a) shall—

(i) Be prepared by, or under the direction of, and certified by a qualified registered professional engineer or registered land surveyor except that all coal processing waste dams and embankments covered by 30 CFR 817.91-817.93 shall be certified by a qualified registered professional engineer;

(ii) Include any design and construction requirements for the structure, including any required geotechnical information;

(iii) Describe the operation and maintenance requirements for each structure; and

(iv) Describe the timetable and plans to remove each structure, if appropriate.

(b) *Sedimentation ponds.*

(1) Sedimentation ponds, whether temporary or permanent, shall be designed in compliance with the requirements of 30 CFR 817.46. Any sedimentation pond or earthen structure which will remain on the proposed mine plan area as a permanent water impoundment shall also be designed to comply with the requirements of 30 CFR 817.49.

(2) Each plan shall, at a minimum, comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2.

(c) *Permanent and temporary impoundments.* Permanent and temporary impoundments shall be designed to comply with the requirements of 30 CFR 817.49. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2.

(d) *Coal processing waste banks.* Coal processing waste banks shall be designed to comply with the requirements of 30 CFR 817.81-817.85.

(e) *Coal processing waste dams and embankments.* Coal processing waste dams and embankments shall be designed to comply with the requirements of 30 CFR 817.91-817.93. Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the

impounded material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) The number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.

(2) The character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam embankment, or reservoir site shall be considered.

(3) All springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan.

(4) Consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) If the structure is 20 feet or higher or impounds more than 20 acre-feet, each plan under paragraphs (b), (c), and (e) of this section shall include a stability analysis of each structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

§ 784.17 Protection of public parks and historic places.

For any public parks or historic places that may be adversely affected by the proposed operation, each plan shall describe the measures to be used to minimize or

prevent these impacts and to obtain approval of the regulatory authority and other agencies as required in 30 CFR 761.12(f).

§ 784.18 Relocation or use of public roads.

Each application shall describe, with appropriate maps and cross sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under 30 CFR 761.12(d), the applicant seeks to have the regulatory authority approve—

(a) Conducting the proposed underground mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(b) Relocating a public road.

§ 784.19 Underground development waste.

Each plan shall contain descriptions, including appropriate maps and cross-section drawings of the proposed disposal methods and sites for placing underground development waste and excess spoil generated at surface areas affected by surface operations and facilities, according to 30 CFR 817.71-817.74. Each plan shall describe the geotechnical investigation, design, construction, operation, maintenance and removal, if appropriate, of the structures and be prepared according to 30 CFR 780.35.

§ 784.20 Subsidence control plan.

The application shall include a survey which shall show whether structures or renewable resource lands exist within the proposed permit and adjacent area and whether subsidence if it occurred could cause material damage or diminution of reasonably foreseeable use of such structures or renewable resource lands. If the survey shows that no such structures or renewable resource

lands exist, or no such material damage or diminution could be caused in the event of mine subsidence, and if the regulatory authority agrees with such conclusion, no further information need be provided in the application under this Section. In the event the survey shows such structures or renewable resource lands exist, or that subsidence could cause material damage or diminution of value or foreseeable use of the land, or if the regulatory authority determines that such damages or diminution could occur, the application shall include a subsidence control plan which shall contain the following information—

(a) A detailed description of the mining method and other measures to be taken which may affect subsidence, including:

(1) The technique of coal removal, such as longwall mining, room and pillar with pillar removal, hydraulic mining or other methods; and

(2) The extent, if any, to which planned and controlled subsidence is intended.

(b) A detailed description of the measures to be taken to prevent subsidence from causing material damage or lessening the value or reasonably forseeable use of the surface, including—

(1) The anticipated effects of planned subsidence, if any;

(2) Measures, if any, to be taken in the mine to reduce the likelihood of subsidence, including such measures as—

(i) Backstowing or backfilling of voids;

(ii) Leaving support pillars of coal; and

(iii) Areas in which no coal removal is planned, including a description of the overlying area to be protected by leaving coal in place.

(3) Measures to be taken on the surface to prevent material damage or lessening of the value or reasonably forseeable use of the surface including such measures as—

(i) Reinforcement of sensitive structures or features;

(ii) Installation of footers designed to reduce damage caused by movement;

(iii) Change of location of pipelines, utility lines or other features;

(iv) Relocation of movable improvements to sites outside the angle-of-draw; and

(v) Monitoring, if any, to determine the commencement and degree of subsidence so that other appropriate measures can be taken to prevent or reduce material damage.

(c) A detailed description of the measures to be taken to mitigate the effects of any material damage or diminution of value or forseeable use of lands which may occur, including one or more of the following as required by 30 CFR 817.124—

(1) Restoration or rehabilitation of structures and features, including approximate land-surface contours, to premining condition.

(2) Replacement of structures destroyed by subsidence.

(3) Purchase of structures prior to mining and restoration of the land after subsidence to condition capable of supporting and suitable for the structures and forseeable land uses.

(4) Purchase of non-cancellable insurance policies payable to the surface owner in the full amount of the possible material damage or other comparable measures.

(d) A detailed description of measures to be taken to determine the degree of material damage or diminution

of value or forseeable use of the surface, including such measures as—

(1) The results of pre-subsidence surveys of all structures and surface features which might be materially damaged by subsidence.

(2) Monitoring, if any, proposed to measure deformations near specified structures or features or otherwise as appropriate for the operation.

[44 FR 15366, Mar. 13, 1979; 44 FR 49686, Aug. 24, 1979]

§ 784.21 Fish and wildlife plan.

(a) Each application shall contain a fish and wildlife plan, consistent with the performance standards of 30 CFR 817.97 and which provides:

(1) A statement of how the plan will minimize disturbances and adverse impacts on fish and wildlife and related environmental values during surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. The plan shall cover the portions of the mine plan area and adjacent areas as determined by the regulatory authority pursuant to § 783.20.

(2) If the applicant states that it will not be practicable, in accordance with paragraph (a)(1) of this section, to achieve a condition which clearly shows a trend toward enhancement of fish and wildlife resources at the time revegetation has been successfully completed under 30 CFR 817.111-817.117, a statement shall be provided which establishes, to the satisfaction of the regulatory authority, why it is not practicable to achieve such a condition.

(b) A statement explaining how the applicant will utilize impact control measures, management techniques,

and monitoring methods to protect or enhance the following, if they are to be affected by the proposed activities:

(1) Threatened or endangered species of plants or animals listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq. and their critical habitats);

(2) Species such as eagles, migratory birds or other animals protected by State or Federal law, and their habitats; or other species identified through the consultation process pursuant to § 783.20; or

(3) Habitats of unusually high value for fish and wildlife, such as wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, reproduction and nursery areas, and wintering areas.

§ 784.22 Diversions.

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with 30 CFR 817.43-817.44.

§ 784.23 Operation plan: Maps and plans.

Each application shall contain maps, plans, and cross-sections of the proposed mine plan and adjacent areas as follows—

(a) The maps, plans and cross-sections shall show the underground mining activities to be conducted, the lands to be affected throughout the operation, and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under 30 CFR 783.24-783.25.

(b) The following shall be shown for the proposed permit area unless specifically required for the mine plan area or adjacent area by the requirements of this Section:

(1) Buildings, utility corridors, and faciliites to be used;

(2) The area of land to be affected within the proposed mine plan area, according to the sequence of mining and reclamation;

(3) Each area of land for which a performance bond or other equivalent guarantee will be posted under Subchapter J of this Chapter;

(4) Each coal storage, cleaning and loading area;

(5) Each topsoil, spoil, coal preparation waste, underground development waste, and non-coal waste storage area;

(6) Each water diversion, collection, conveyance, treatment, storage and discharge facility to be used;

(7) Each source of waste and each waste disposal facility relating to coal processing or pollution control;

(8) Each facility to be used to protect and enhance fish and wildlife related environmental values;

(9) Each explosive storage and handling facility;

(10) Location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance with 30 CFR 784.16 and disposal areas for underground development waste and excess spoil, in accordance with 30 CFR 784.19.

(11) Each profile, at cross-sections specified by the regulatory authority, of the anticipated final surface configuration to be achieved for the affected areas;

(12) Location of each water and subsidence monitoring point;

(13) Location of each facility that will remain on the proposed permit area as a permanent feature, after the completion of underground mining activities.

(c) Maps, plans, and cross-sections required under paragraphs (b)(5), (6), (10), and (11) of this section shall be prepared by, or under the direction of and certified by a qualified professional engineer, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture, except that—

(1) Maps, plans, and cross-sections for sedimentation ponds may only be prepared by a qualified registered engineer; and,

(2) Excess spoil and underground development waste facilities maps, plans, and cross-sections may only be prepared by a qualified registered professional engineer.

[44 FR 15366, Mar. 13, 1979; 44 FR 49686, Aug. 24, 1979]

§ 784.24 Transportation facilities.

Each application shall contain a detailed description of each road, conveyor, and rail system to be constructed, used, or maintained within the proposed permit area. The description shall include a map, appropriate cross sections, and the following:

(a) Specifications for each road width, road gradient, road surface, road cut, fill embankment, culvert, bridge, drainage ditch, and drainage structure.

(b) A report of appropriate geotechnical analysis, where approval of the regulatory authority is required for alternative specifications or for steep cut slopes under 30 CFR 817.150(d), 817.152(c), 817.160(d) or 817.162(c).

(c) A description of each measure to be taken to obtain approval of the regulatory authority for alteration or relocation of a natural drainageway under 30 CFR 817.153(d), 817.163(d) or 817.173(c).

(d) A description of measures, other than use of a rock headwall, to be taken to protect the inlet end of a ditch relief culvert, for approval by the regulatory authority under 30 CFR 817.153(c)(2)(vi) and 817.163 (c)(2)(vi).

(e) Each plan shall contain a general description of each road, conveyor, or rail system to be constructed, used, or maintained within the proposed mine plan area.

§ 784.25 Return of coal processing waste to abandoned underground workings.

(a) Each plan shall describe the design, operation and maintenance of any proposed coal processing waste disposal facility, including flow diagrams and any other necessary drawings and maps, for the approval of the regulatory authority and the Mine Safety and Health Administration under 30 CFR 817.88.

(b) Each plan shall describe the source and quality of waste to be stowed, area to be backfilled, percent of the mine void to be filled, method of constructing underground retaining walls, influence of the backfilling operation on active underground mine operations, surface area to be supported by the backfill, and the anticipated occurrence of surface effects following backfilling.

(c) The applicant shall describe the source of the hydraulic transport mediums, method of dewatering the placed backfill, retainment of water underground, treatment of water if released to surface streams, and the effect on the hydrologic regime.

(d) The plan shall describe each permanent monitoring well to be located in the backfilled area, the stratum underlying the mined coal, and gradient from the backfilled area.

(e) The requirements of paragraphs (a), (b), (c), and (d) of this section shall also apply to pneumatic

backfilling operations, except where the operations are exempted by the regulatory authority from requirements specifying hydrologic monitoring.

§ 784.26 Air pollution control plan.

For all surface operations associated with underground mining activities, the application shall contain an air pollution control plan which includes the following:

(a) An air quality monitoring program, if required by the regulatory authority, to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices, under paragraph (b) of this section to comply with applicable Federal and State air quality standards; and

(b) A plan for fugitive dust control practices, as required under 30 CFR 817.95.

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-1144

No. 80-1308

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, PEABODY COAL COMPANY,
Appellant

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN, Chief Judge, WRIGHT, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS and GINSBURG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: April 1, 1981

Opinion for the Court filed by Circuit Judge Mikva.

Dissenting opinion, in which Circuit Judges MacKinnon, Robb, and Wilkey join, filed by Circuit Judge Tamm.

Dissenting opinion filed by Circuit Judge MacKinnon.

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL WILDLIFE FEDERATION IN OPPOSITION

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June 5, 1981

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QUESTION PRESENTED

Whether the Surface Mining Act authorizes the Secretary of the Interior to promulgate regulations prescribing minimum information requirements for permit applications submitted to state regulatory agencies.

PARTIES BELOW

Respondent National Wildlife Federation* accepts the Petitioner's list of all parties to the proceeding when it was decided on the merits by the *en banc* court below.

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* The National Wildlife Federation has one subsidiary, Wildlife Publications, Inc., and one sister company, National Wildlife Federation Endowment, Inc. In addition, the Federation has 53 "affiliates." It is doubtful that these organizations are affiliates within the meaning of Rule 28, since the Federation does not have any ownership, interest, or control over these organizations. The "affiliates" are recognized in the Federation's Bylaws to be independent and autonomous. We list them here in an exercise of caution. The affiliates are situated in each of the states, as well as in Guam, the Virgin Islands, and Puerto Rico. Each bears the name "Wildlife Federation" preceded by the name of the State or Territory (*e.g.*, Alabama Wildlife Federation), except for the following: Alaska Sportsmen's Council; California Natural Resources Federation; Wildlife Federation of Delaware; Guam Science Teachers Association, Inc.; Conservation Council for Hawaii; Indiana Conservation Council, Inc., League of Kentucky Sportsmen, Inc.; Natural Resources Council of Maine; Michigan United Conservation Clubs; Minnesota Conservation Federation; Conservation Federation of Missouri; New Jersey Federation of Sportsmen's Clubs; New York State Conservation Council; League of Ohio Sportsmen; Pennsylvania Federation of Sportsmen's Clubs; Natural History Society of Puerto Rico, Inc.; Environmental Council of Rhode Island, Inc.; Tennessee Conservation League; Sportsmen's Clubs of Texas; Vermont Natural Resources Council; Virgin Islands Conservation Society, Inc., and Washington State Sportsmen's Council.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1863

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL WILDLIFE FEDERATION IN OPPOSITION

OPINIONS BELOW—JURISDICTION—

STATUTES AND REGULATIONS INVOLVED

The opinions below have been properly identified by the Petitioner and Respondent National Wildlife Federation accepts the Petitioner's statement regarding jurisdiction and the recitals of the relevant statutes.

STATEMENT OF THE CASE

The issue presented for review by this Court was raised by Petitioner before the U.S. District Court for the District of Columbia pursuant to section 526(a)(1)

of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201, *et seq.* The issue was decided, on motion for preliminary injunction, adversely to Petitioner. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the denial of the Motion for Preliminary Injunction. The U.S. District Court then decided the issue on the merits against Petitioner. A separate appeal, pursuant to Rule 54(b), Fed. R. Civ. P., was then taken to the U.S. Court of Appeals. The panel decision of the Court of Appeals issued on July 10, 1980, reversed the decision of the District Court. The full Court of Appeals, however, acting on a suggestion for Rehearing *en banc*, vacated the panel decision, and on April 1, 1981, affirmed the decision of the District Court.

The *en banc* court cited two separate statutory bases for upholding the Secretary's authority to promulgate regulations establishing minimum information requirements for permit applications. The first, section 201 (c)(2), authorizes the Secretary to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." The second, section 501(b), authorizes the Secretary to promulgate regulations "establishing procedures and requirements for preparation, submission, and approval of state programs, and development and implementation of Federal programs. . . ."

On May 6, 1981, Petitioner filed a Petition for Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

The Court should deny the Petition for Writ of Certiorari because the Court of Appeals for the District of Columbia's *en banc* decision is correct and the issue is a narrow one of statutory construction.

Sections 201(c)(2) and 501(b) of the Surface Mining Control and Reclamation Act of 1977 authorize the Secretary of the Interior to promulgate regulations requiring minimum information for surface mining permit applications.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. The En Banc Decision Is Correct.

The *en banc* decision of the U.S. Court of Appeals upholding the authority of the Secretary of the Interior to promulgate regulations prescribing minimum information for surface mining permit applications is correct and does not warrant review by this Court.

As noted in the statement of the case, the *en banc* Court of Appeals, and this Respondent, rely on two statutory provisions as authority for the Secretary to promulgate regulations requiring additional data for surface mining permit applications. Respondent will deal with each in turn.

1. § 201(c)(2)—Section 201(c)(2) authorizes the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." On its face, § 201(c)(2) gives the Secretary general authority to promulgate regulations which he deems necessary to achieve an important provision of the Act. The Petitioner, however, contends that § 201(c)(2) does not mean what it says. Rather, it argues that the provision should be narrowly construed to limit the Secretary to promulgating rules on "routine housekeeping" matters. Petitioner makes a rather strained argument to support this narrow view. It argues that because the Act contains a number of specific grants of rulemaking authority, Congress did not intend § 201(c)(2) to authorize the Secretary to

promulgate substantive regulations that go beyond the specific grants of rulemaking authority.

There are several fatal flaws in this position. Respondent will cite two of the most obvious. First, there is no legislative history which indicates that Congress intended that § 201(c)(2) be anything other than what it appears to be—a general grant of rulemaking authority. Conversely, there is no legislative history that Congress meant the specific grants of rulemaking authority to undercut or limit the general grant of authority set out in § 201(c)(2).[1]

Second, as the *en banc* court noted, such a restrictive interpretation of a general grant of rulemaking authority in a statute where specific grants of rulemaking authority exist is squarely at odds with a number of recent cases decided by this Court. *See, e.g., E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132 (1977); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973). Petitioner's argument would lead to the conclusion that § 201(c)(2) is excess verbiage.

2. § 501(b)—Section 501(b) authorizes the Secretary to establish procedures and requirements for preparation, submission, *and approval* of state programs." (Emphasis added.) The *en banc* Court of Appeals correctly interpreted this provision to grant the Secretary substantive powers to establish standards for state programs.

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[1] The plain language of the Act indicates that Congress intended that the Secretary could set minimum information standards which go beyond those specifically enumerated in the Act. Section 507(b), which establishes permit application requirements, states that "The permit application shall . . . contain, *among other things*, . . ." (emphasis added). The phrase "among other things" assumes that "other things," i.e., more information, may be required. Congress quite clearly never intended the list of information requirements set out in § 507(b) to be exclusive. Rather, Congress intended the information requirements in § 507(b) to be the bedrock below which neither the Secretary nor a state regulatory agency could fall in requiring information.

The Petitioner concedes that the Secretary can disapprove a state program if it does not contain adequate permit information requirements even though those requirements may go beyond those enumerated in the Act. At the same time, Petitioner argues that the Secretary is powerless to promulgate regulations indicating what permit information requirements must be included to prevent rejection of a state program. In short, Petitioner would require the Secretary to proceed on a case-by-case basis. Clearly, this would be administratively unworkable. Moreover, in similar situations this Court has repeatedly upheld the authority of an agency to proceed by regulation, as opposed to case-by-case adjudication. *See, e.g., E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-35 (1977); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 619-21 (1973).

B. The Issue Is A Narrow One.

In its Petition, Petitioner characterizes this case as one of first importance. It argues that the Court of Appeals decision, if left standing, would place considerable economic and administrative burdens on the companies involved. Petitioner further contends that the case raises fundamental issues of state-federal relationships and that it involves political rather than technical issues. Such is not the case. The question involved is an extremely narrow issue of statutory construction—whether sections 201(c)(2) or 501(b) of the Surface Mining Act authorize the Secretary of the Interior to promulgate regulations establishing minimum requirements for permit applications.

The heart of Petitioner's argument is that if the Secretary is permitted to set minimum information requirements for surface mining permits, there would be no bar to keep the Secretary "from invading all other state prerogatives," and from placing overwhelming administrative and economic burdens on operators. (Pet. 10, 11,

13.) The short response to this contention is that the Petitioner or other affected parties remain free to challenge any improper invasion of state prerogative as an abuse of the Secretary's discretion. Indeed, Petitioner itself has not shied away from such challenges in the past. [App. A, 6a, Fn. 4.] Respondent would emphasize that the only issue decided by the U.S. Court of Appeals was the authority of the Secretary to promulgate *any* permitting regulations. The wisdom of any particular permitting requirement was not before the Court of Appeals and is not before this Court.

In a related argument, the Petitioner contends that the Secretary of the Interior should not be permitted to require minimum information requirements since primary responsibility for regulation under the Surface Mining Act rests with the states. (Pet. 11-13, 17-18, 19.) This argument overlooks the fact that the Federal Government has the responsibility under the Act to establish nationwide minimum standards and to provide oversight. §§ 101(g), 503, 517. It is this responsibility that requires establishment of minimum information requirements for permit applicants. In addition, minimum information requirements enable citizens and citizen groups such as Respondent to effectively exercise their rights under the Surface Mining Act. §§ 513(c), 514.

Finally, Petitioner's petition contains the puzzling contention that the courts should not defer to the judgment of the Secretary of the Interior in this case since the issue involved is political rather than technical and was made by a prior Secretary of the Interior. (Pet. 13.) The issue raised in the instant case involves a narrow and technical statutory implementation judgment by the agency responsible for administering the Act, and is therefore entitled to deference under the established principles of administrative law. *See, e.g., Miller* v. *Youakim*, 440 U.S. 125, 145, n. 25 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1863

In the Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Surface Mining Control and Reclamation Act of 1977 authorizes the Secretary of the Interior to promulgate regulations requiring the States, if they wish to administer the permanent regulatory programs, to obtain from surface mining permit applicants information in addition to items expressly enumerated in the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1863

PEABODY COAL COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-45a) is reported at 15 E.R.C. 1802. The opinion of the panel of the court of appeals (Pet. App. 48a-72a) is reported at 14 E.R.C. 1813. The opinion of the district court denying petitioner's motion for partial summary judgment (Pet. App. 73a-143a) is reported at 14 E.R.C. 1083. The opinion of the court of appeals affirming the district court's denial of a preliminary injunction (Pet. App. 144a-147a) is reported at 617 F.2d 807. The opinion of

the district court denying petitioner's motion for preliminary injunction (Pet. App. 148a-187a) is reported at 13 E.R.C. 1586.

JURISDICTION

The judgment of the court of appeals en banc was filed on April 1, 1981 (Pet. App. 291a). A petition for writ of certiorari was filed on May 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.*, Congress established "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. (Supp. III) 1202(a). The Secretary of the Interior (Secretary), acting through the Office of Surface Mining Reclamation and Enforcement, has the primary responsibility for administering the Act by promulgating regulations and enforcing its provisions. Section 201(c), 30 U.S.C. (Supp. III) 1211(c).

The principal regulatory and enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. III) 1251-1279. Section 501 of the Act, 30 U.S.C. (Supp. III) 1251, establishes a two-stage program for the regulation of surface coal mining. Section 501(a) provides for an initial, or interim, regulatory phase, and Section 501(b) provides for the subsequent, permanent phase of the program. During the initial period, the Secretary has exclusive authority to enforce the Act, although the States may assist him in enforcing the standards applicable during the interim phases. 30 U.S.C. (Supp. III) 1252

(e). The interim regulation of surface coal mining by the Secretary is not in issue here.

For the permanent phase, Congress provided, in Section 503 of the Act, 30 U.S.C. (Supp. III) 1253, that each State wishing to do so could assume primary responsibility for enforcing the Act on nonfederal lands within its borders. Such state regulatory programs are, however, to be subject to continuing federal oversight (see, *e.g.*, Sections 517 and 521, 30 U.S.C. (Supp. III) 1267 and 1271),[1] and they may not go into effect until they have been approved by the Secretary, pursuant to Sections 501(b) and 503 of the Act. If a State fails to submit a program that meets with the Secretary's approval within the prescribed time—or simply decides not to undertake the primary enforcement responsibility under the Act—the Secretary promulgates and enforces a federal program for the State. Section 504(a), 30 U.S.C. (Supp. III) 1254(a).

The Secretary's function of approving or disapproving State regulatory programs cannot be performed ad hoc. Section 501(b) of the Act, 30 U.S.C. (Supp. III) 1251(b), specifically requires him to promulgate and publish "regulations * * * establish-

[1] Section 517(a) of the Act provides for federal inspections of mining and reclamation operations to permit the Secretary "to evaluate the administration of approved State programs." Section 521(a) of the Act provides for federal inspections and enforcement measures in cases in which a State has failed to take action to remedy an apparent violation of the Act; and Section 521(b) provides for direct federal enforcement of a regulatory program within a State when it is determined that the State has failed to enforce its program effectively.

In Section 520 of the Act, 30 U.S.C. (Supp. III) 1270, Congress also provided for enforcement of the Act through citizens suits brought in the district courts.

ing procedures and requirements for preparation, submission, and approval of State programs * * *." Section 201(c)(2), 30 U.S.C. (Supp. III) 1211(c)(2), requires him, in more general terms, "to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the Act]."

To obtain the Secretary's approval of its proposed program, a State must, pursuant to Section 503(a), demonstrate that it "has the capability of carrying out the provisions of [the Act] and meeting its purposes" through, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the [Act's] requirements," a state law providing for the effective implementation of a mining permit system (see discussion, pages 4-5, *infra*), and "rules and *regulations consistent with regulations issued by the Secretary pursuant to [the Act]*" (emphasis added). Consistent with these requirements, Section 701(25) of the Act, 30 U.S.C. (Supp. III) 1291(25), defines a "State program" as one duly established "to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of [the Act] and regulations issued by the Secretary pursuant to [the Act]."

The express statutory requirements that a state program must incorporate a detailed set of environmental protection performance standards specified in Sections 515 and 516 of the Act, 30 U.S.C. (Supp. III) 1265 and 1266, to be met by any person who engages in surface coal mining operations within the Act's coverage, and a permit system. The permit system is the primary means through which the Act, including its performance standards, is enforced,

since Section 506(a) of the Act, 30 U.S.C. (Supp. III) 1256(a), provides that no one may engage in surface coal mining operations without first obtaining a permit from either the State "pursuant to an approved State program" or the Secretary, if he is the regulatory authority for the lands in question.

The Act also includes requirements pertaining to the operation of the permit system, *e.g.*, application requirements and requirements to be met by reclamation plans submitted with applications (Sections 507 and 508, 30 U.S.C. (Supp. III) 1257 and 1258), bonding requirements for permittees (Section 509, 30 U.S.C. (Supp. III) 1259), and procedures and decisional criteria for permit approval or denial (Sections 510, 513 and 514, 30 U.S.C. (Supp. III) 1260, 1263 and 1264). In prescribing application requirements, Section 507(b) of the Act lists specific categories of information that, "among other things," each permit application must contain. These include such matters as the identity of the owners of the land and mining business concerned, the proximity of buildings to the permit area, the history of the applicant with respect to bond forfeiture or permit revocations under the Act, descriptions of the mining methods proposed, probable effects on surface and ground water systems, and other information pertinent to the determination whether the applicant is likely to be able to carry out his proposed operations in a manner that will comply with the Act's requirements for environmental protection and land reclamation. Section 508 of the Act requires the submission of a detailed reclamation plan as part of the permit application and describes information that must be included in the plan.

b. On March 13, 1979, pursuant to his rulemaking authority in Sections 201(c)(2) and 501(b) of

the Act, the Secretary promulgated regulations for the permanent regulatory programs. 30 C.F.R. Part 700 *et seq.*, 44 Fed. Reg. 15313 (1979). The regulations, *inter alia*, establish the procedures by which state programs may be submitted and reviewed and the requirements they must meet in order to be approved. This includes specification of the minimum information that the programs must require applicants for surface coal mining permits to submit with their applications. 30 C.F.R. Parts 778-780 and 782-784. The regulations call for the submission of the information specified in Sections 507 and 508 of the Act and additional information, based on these and other sections of the Act, falling into the same general categories as those found in the statute, *i.e.*, (1) information relating to the identity of the mine operator and owners of interests in affected land; (2) the applicant's record of compliance with mining and reclamation laws, (3) environmental data relating to the permit area, and (4) the proposed mining and reclamation plan, including the engineering techniques to be used.

The regulations also provide, in a section known as the "state window" provision (30 C.F.R. 731.13), that a State may, in its program submission, propose alternatives to specific regulation provisions, so long as it demonstrates that such alternatives will be consistent with the Act and implementing regulations and are necessitated by "local requirements or local environmental or agricultural conditions."

2. This action was commenced by petitioner, several other coal companies and mining trade associations, two States, and several environmental organizations, who filed nine separate complaints in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act,

30 U.S.C. (Supp. III) 1276(a)(1), challenging the validity of the Secretary's regulations on various grounds.[2] Petitioner, *inter alia*, challenged the Secretary's authority to issue *any* permit requirement regulations with respect to the state programs, contending that the question of what information to demand of applicants beyond that expressly specified in the Act is entierly within the province of the State, unless the State chooses not to undertake the primary enforcement responsibility permitted it under the Act (Pet. App. 102a-103a, 182a).

On August 21, 1979, the district court, having consolidated the complaints, denied several motions for preliminary injunctive relief (Pet. App. 148a-187a), holding, *inter alia*, that petitioner was unlikely to prevail on the merits of its claim respecting the Secretary's authority to promulgate the permit information regulations (*id.* at 182a-183a). The order denying preliminary injunctive relief was affirmed on the appeals of petitioner and several other parties (*id.* at 144a-147a).

Because the parties were jointly making approximately one hundred separate challenges to the Secretary's regulations, the district court divided the challenges into two "rounds" of litigation (Pet. App. 73a-74a). On February 26, 1980, ruling on motions for partial summary judgment in the "First Round," the district court held (*id.* at 75a-79a, 102a-105a), *inter alia*, that the Secretary has the requisite authority under Sections 201(c)(2) and 501(b) of the

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[2] Section 526(a)(1) provides that the action of the Secretary in promulgating national rules or regulations is reviewable exclusively in the United States District Court for the District of Columbia.

Act, 30 U.S.C. (Supp. III) 1211(c)(2) and 1251(b), to promulgate regulations concerning the substance of state regulatory programs under the Act, including permit information requirements, and to condition his approval of permanent state programs on a showing that the programs are consistent with those regulations. Reviewing challenges to particular regulatory provisions, the court upheld some and remanded others to the Secretary for revision, having found that they lacked a rational basis in the statute (Pet. App. 80a-102a, 105a-142a).[3]

3. Pursuant to Rule 54(b), Fed. R. Civ. P., the district court directed the entry of a final judgment on petitioner's claim that the Secretary lacked authority to promulgate the permit information regulations, and petitioner appealed from that judgment (Pet. App. 52a). The court of appeals panel, one judge dissenting, reversed the district court (*id.* at 48a-72a), concluding (*id.* at 53a-56a) that, although the language of the Act could reasonably be read to confer on the Secretary the rulemaking authority he claimed and the legislative history was "a blind alley," the "Act's purposes and structure" revealed "that the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to deter-

[3] Following the "Second Round" of briefing, the district court ruled on the remaining challenges to particular regulations, again upholding some and invalidating others. *In re Permanent Surface Mining Regulation Litigation*, Civ. Action No. 79-1144 (Consolidated) (D.D.C. May 16, 1980). The Secretary has recently decided to undertake a thorough review of all of the regulations promulgated under the Act (see 46 Fed. Reg. 34349 (1981)), and has moved in the court of appeals to have proceedings there (on appeal from the district court decision) held in abeyance pending the outcome of this review.

mining whether the states have satisfied that minimum." The panel accordingly held (*id.* at 56a) "that the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out."

4. The court of appeals, on rehearing en banc, four members dissenting, vacated the panel decision and affirmed the district court (Pet. App. 1a-45a). The court noted at the outset (*id.* at 5a-6a) that it was deciding only the narrow question "whether the Secretary has rulemaking authority to require that permit applicants submit *any* items of information beyond those enumerated in the Act" and that its review did not "extend to the question whether the regulations actually promulgated by the Secretary are permissible exercises of that authority."

The court found in the statute's language and legislative history a congressional intent to afford the States (1) "an opportunity to propose regulatory programs of their own, conforming to the requirements of the Act and to regulations promulgated by the Secretary" and (2) the right, once their programs are approved, to operate as "the exclusive 'on the scene' regulatory authorit[ies,]" subject only to "the Secretary's oversight function[,] * * * shared in part by the public, which is given the right to sue in federal court, to compel compliance with the state program and its permits" (Pet. App. 7a-11a). The court noted (*id.* at 16a) that, given this basic statutory scheme, "[t]he importance of an adequate data base to state decisionmaking [concerning the issuance of particular permits], federal supervision, and citizen oversight makes the state program's information-gathering provisions crucial to the success of the Act." It found the Secretary's promulgation of regulations requiring additional information from

permit applicants in approved state programs a measure that is both in keeping with the Secretary's duty to monitor a State's "overall performance in administering the Act" (*id.* at 24a) and clearly preferable to case-by-case decisions on state programs, without clear published guidelines of the standards for program approval (*id.* at 22a-23a).

Finally, after examining the text of the Act and the legislative history indicating Congress's intent to list in the statute "the *type* of information" it wished States to have "at [their] disposal" in making decisions on applications for surface mining permits (*id.* at 25a-27a), the court held (*id.* at 28a) that "the Act's explicit listings of information required of permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act."

ARGUMENT

To the extent that petitioner challenges the narrow holding of the court of appeals sustaining the Secretary's authority, under the Surface Mining Control and Reclamation Act of 1977, to establish standards for his approval of state regulatory programs by promulgating, *inter alia*, permit information regulations that do more than merely reproduce the statutory text, petitioner's contention is based on an incorrect reading of the plain language and the legislative history of the Act. To the extent that petitioner contends that the Secretary's permit information regulations are unduly lengthy and burdensome, its challenge is premature, since the court of appeals did not decide that question and since, in any event, the Secretary is at present engaged in a full-scale

reconsideration of all the regulations promulgated under the Act. Accordingly, review by the Court is not warranted.

1. Petitioner's principal argument (Pet. 11-13, 17-19) is that the decision of the court of appeals gives the Secretary "unlimited power to impose any regulations he chooses" (Pet. 17), and, contrary to congressional policy and constitutional considerations, leaves the States no significant role in administering provisions of the Act. Its argument represents a misunderstanding both of the decision below and the framework of the Act.

The court of appeals' construction of the Act recognizes (Pet. App. 8a) a State's authority, in a properly approved regulatory program, as "the sole issuer of permits"—*i.e.*, the authority that "decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place." Similarly, the court acknowledges (Pet. App. 9a, 24a) the State's authority to rule on the acceptability of particular reclamation plans, set bond amounts, inspect mines for compliance, impose appropriate penalties, and require data from permit applicants in addition to that provided for in the Act and implementing regulations. The Act's grant of this enforcement authority to the States is responsive to the congressional concern underlying the finding in Section 101(f) of the Act, 30 U.S.C. (Supp. III) 1201(f), on which petitioners place special weight (Pet. 6-7, 13-14), that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations," the States should exercise "primary governmental responsibility" for "developing,

authorizing, issuing, and enforcing regulations for surface mining * * * operations."[4]

But, as the court of appeals correctly pointed out (Pet. App. 11a-13a), Congress was also intent on establishing a "nationwide program to protect society and the environment from the adverse effects of coal mining operations" (Section 102(a), 30 U.S.C. (Supp. III) 1202(a)) and providing uniform standards for surface coal mining "in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders" (Section 101(g), 30 U.S.C. (Supp. III) 1201(g)). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 15. Petitioner contends (Pet. 18) that Congress remedied the problem, then existing, of inadequate mining regulation practices *solely* by prescribing performance standards and listing, in the statute, information to be required with permit applications. But this argument ignores

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[4] The Secretary has also accommodated, in his "state window" regulation, 30 C.F.R. 731.13, this congressional concern that States be allowed to operate regulatory programs that take into account differing local conditions. Under that regulation, as construed by the district court (Pet. App. 83a), a state proposing an alternative to one of the Secretary's substantive regulations need only demonstrate that "(1) local conditions make it difficult to meet the federal standard; (2) the state alternative relates to local conditions; and (3) the alternative is no less stringent than the federal regulation."

The Secretary has recently proposed for comment a modification of the "state window" regulation that would allow States to adopt any regulations that are as effective as those promulgated by the Secretary in meeting the requirements of the Act. 46 Fed. Reg. 34348 (1981).

the plain language of the Act specifying the Secretary's responsibilities and defining the programs through which the States exercise their regulatory authority.

Thus, the Secretary is obligated, by the terms of Section 501(b) of the Act, to promulgate regulations establishing "requirements" for his "approval of [s]tate programs." States submitting regulatory programs must, pursuant to Section 503(a)(7), demonstrate their ability to carry out the provisions of the Act and its purposes by showing, among other things, that they have provided for "rules and regulations consistent with regulations issued by the Secretary pursuant to [the Act]." Accordingly, a "[s]tate program" is one established pursuant to Section 503 to regulate surface coal mines on lands within the State "in accord with the requirements of [the Act] and regulations issued by the Secretary pursuant to [the Act]."

The fact—emphasized by petitioner (Pet. 14-15)—that the sections of the Act "dealing with permitting and bonding, including the information requirements" speak only of "the regulatory authority" and do not refer to the Secretary is not inconsistent with the court of appeals' understanding of the Secretary's role. When the State is acting as "the regulatory authority," it is doing so in an approved state program; and, as noted, the Secretary's role in program approval is defined in other sections of the Act.

Similarly, contrary to petitioner's suggestion (Pet. 18), the mere fact that Congress listed, in the statute, the information that "among other things" must be submitted by a permit applicant, is not inconsistent with the Secretary's promulgation of regulations requiring the submission of additional information on matters similar to those listed in the statute. As

the court of appeals noted (Pet. App. 25a-26a), the relevant House Committee report emphasized the need for a "thorough and comprehensive data base" for proper permitting decisions and explained that the bill would delineate "in detail the *type of information* required in permit applications in sections 507 and 508." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 91 (1977) (emphasis added). Indeed, if the Secretary were limited to merely reproducing the text of the statute, permit applicants would be able to avoid supplying information that is plainly essential to making certain that the grant of a particular permit will not violate express terms of the Act. For example, as the court of appeals noted (Pet. App. 4a), the regulation requiring the submission of waivers from the owners of occupied dwellings within 300 feet of proposed surface mining activities (30 C.F.R. 778.16(c)) is necessary to implement the requirement in Section 522(e)(5) of the Act, 30 U.S.C. (Supp. III) 1272(e)(5), that no covered surface coal mining operations be permitted within that distance of occupied dwellings "unless waived by the owner thereof."

Given the congressional purposes outlined above and the statutory framework that embodies them, it is reasonable to take Congress at its word in granting to the Secretary in Section 501(b) the power to promulgate regulations establishing "requirements," as distinguished from "procedures," for his approval of state regulatory programs. It is similarly reasonable to construe the grant of authority in Section 201(c)(2) of the Act—which gives the Secretary the power to promulgate regulations "necessary to carry out the purposes and provisions of [the] Act"—as a provision authorizing him to promulgate permit application information regulations that will assist

him in his duty to approve only those state programs that he is persuaded will fulfill the Act's purposes, that will give notice to the States of his standards for approval and thereby expedite the approval process, and that will facilitate his task of monitoring the effectiveness of State programs. Such regulations are " 'reasonably related to the purposes of the enabling legislation' " and therefore sustainable under established standards for reviewing the validity of regulations. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796 (1978). This rational nexus requirement imposes substantive limits on the Secretary's rulemaking authority, and thus does not leave the Secretary free, as petitioner contends (Pet. 17), "to impose any regulations he chooses."

By contrast, petitioner's implicit contention that the Secretary lacks power to promulgate *any* substantive regulations relating to the permit application information to be required in state programs would lead to unreasonable results. Either the Secretary, in exercising his approval authority, would function essentially as a clerk, comparing the text of the state laws and regulations comprising the proposed state programs with the text of the federal statute and verifying that the texts are identical, or he would exercise his judgment as the principal official responsible for administering the statute and for assuring that its purposes are achieved, but base his approval decisions on unpublished standards made known to the States only *after* he has decided whether to approve their programs. The court of appeals properly refused to accept as a credible construction of the stat-

ute a reading that would limit the Secretary to these options (Pet. App. 21a-23a).

Finally, there is no merit to petitioner's suggestion (Pet. 11) that constitutional considerations dictate acceptance of its proposed construction of the Act because the Act is "a land-use provision" that pushes "deeply into an area of traditional state authority * * *." As this Court observed in *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 14 n.18 "[T]he Surface Mining Act is [not] a land use measure after the fashion of the zoning ordinances typically enacted by state and local governments." Rather, it is a statute regulating a private activity—surface coal mining—that Congress rationally concluded "has substantial effects on interstate commerce" and that Congress accordingly may regulate under the Commerce Clause without offending any prerogatives of the States under the Tenth Amendment. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 13-15, 21-26.

2. By its repeated emphasis (Pet. 5, 10-11 & n. 12, 12, 18) on the number of columns and pages taken up by the Secretary's regulations and the alleged burdensomeness of those regulations, petitioner suggests that the regulations are vulnerable to attack even if the Secretary is authorized to do more than copy the Act's provisions. But, as the court of appeals observed (Pet. App. 19a), petitioner had been "participating" in the district court, in the process of challenging individual regulations on the grounds that they are "arbitrary, capricious, or inconsistent with the Act," and nothing in the court of appeals' opinion forecloses "[petitioner's] challenges to individual regulations." Moreover, as we have explained (page 8 note 3, *supra*), the Secretary is at present engaged in reviewing each of the regulations,

and until that review is completed, it is uncertain what regulatory requirements permit applicants will ultimately be asked to meet. Because of that uncertainty and because the court of appeals did not address the burdensomeness contention, that question is not properly before the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 80-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Secretary's brief in opposition does not directly address the grounds we addressed [Pet. 10-14] as reasons for granting the writ: the practical importance of the issue, the invasion of state authority preserved alike by the Act and the federal structure of our nation, the heavy reliance by the majority of the *en banc* court below upon the judgment of a former Secretary, and the fact that the issue can, under the Act, be considered by no lower court other than the sharply divided Court of Appeals for the District of Columbia Circuit. If there be any reason why these considerations do not indicate the desirability of review by this Court, that reason is not suggested by the Secretary.

Instead, the Secretary's brief in opposition is directed solely to our summary showing, by way of precaution [Pet. 14-19], that the decision of the court below is wrong.[1] Our view of the merits is sufficiently indicated

[1] The same may be said of the brief in opposition for the National Wildlife Federation *et al.*

in our petition. Here we undertake only to identify and to disown three strawmen erected and attacked by the Secretary.

1. We do not deny the Secretary's authority to issue suitable regulations to interpret the information requirements of the Act and to guide the states in the development of their own regulations [see Br. in Opp. 14, 15-16]. We do deny the Secretary's power completely to displace the state authority and himself to prescribe the detail of the information requirements, thus reducing state authority to the ministerial act of copying off 33 pages of the Code of Federal Regulations [Pet. 5, 10-11, 15]. The difference is both one of kind and one of degree and is crucial in either view.

2. We complain that the decision below gave the Secretary unlimited power to prescribe whatever regulations he wished, to be adopted by the state agency as a condition to approval of its program [Pet. 17]. The Secretary attacks this complaint [Br. in Opp. 11-12] because the court below recognized [at A, 8a-9a] that the Act delegated four functions to the state agency which presumably could not be withdrawn as a condition of approval. The argument serves only to convict us of not drafting a petition as though it were a statute, with even self-evident exceptions spelled out.

3. The Secretary, quoting our petition completely out of context, characterizes our concern about the Act's intrusion into land use activities normally left to the States as a "constitutional consideration" recently rejected by this Court. [Pet. 11; see Br. in Op. 16.] See also, *e.g.*, *Hodel* v. *Indiana*, 49 U.S.L.W. 4667 (U.S. Sup. Ct., June 15, 1981). Our point was not "constitutional" in nature, but instead it was simply designed to show that when Congress divided the Act's governmental responsibilities between the Secretary and the states, it was acutely aware that it was legislating in a delicate

area, and, accordingly, sought, as the majority below recognized, not to displace the states from much of their traditional role. Our position here is that the Secretary's insistence on dictating detailed permitting information regulations to the states—which, under the Act, indisputably have sole permitting authority—substantially undercuts that Congressional intent.

Finally, the present Secretary avers that he is considering and promulgating proposed regulations better designed than those of his predecessors to accommodate varying local conditions [Br. in Opp. 18]. That is nice, but does not go very far to change the meaning of the statute as it has been construed in heavy deference to the centralized authority asserted by the former Secretary.

CONCLUSION

We urge that the petition for a writ of certiorari, for the reasons stated therein and in this reply, should be granted.

Respectfully submitted,

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